Cluster munitions

A survey of legal responses
“...in Mekele, the cruelllest weapons, internationally forbidden cluster bombs, were used on a civilian population.”

Ethiopian Ministry of Foreign Affairs, 13 June 1998
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CLUSTER MUNITIONS: A SURVEY OF LEGAL RESPONSES 1
The international community has failed the civilian victims of cluster munitions on a monumental scale. Their use in Lebanon in 2006, despite the appeals of humanitarian organisations, is the most recent example of that failure. However the legitimacy of the use of cluster munitions in future conflicts is currently the subject of international reassessment. The Norwegian Government’s appeal in February 2007 for the establishment an international treaty prohibiting the use of cluster munitions that cause unacceptable harm to civilians had received support from approximately 100 governments by the end of that year. Recent decisions in the international and UK domestic criminal courts also indicate a growing rejection of the legitimacy of cluster munition use which will have implications for the conduct of any future conflict.

This report by Landmine Action provides a survey of legal responses to specific incidents of cluster munition use over the last ten years. Notable among the positive developments is, first, the conviction of Milan Martić by the International Tribunal for the Former Yugoslavia for war crimes in the use of cluster munitions against Zagreb, marking the first imposition of individual criminal responsibility for the use of cluster munitions. Second, in the UK a jury held that it was a reasonable use of force for two peace campaigners in 2003 to attempt to disable US B52 bombers carrying cluster munitions to be dropped in Iraq in the light of the defendants’ belief that their use would constitute a war crime. The defendants gave evidence of the short- and long-term effects of cluster munitions used in previous conflicts as providing the basis for their belief.

The imposition of individual criminal responsibility in the Martić case means that the legality of any use of cluster bombs can now be scrutinised in a variety of fora, from the International Criminal Court and other international tribunals to domestic criminal jurisdictions, and military commanders and Ministers of Defence should be accountable for their impact on civilians. Even whilst a treaty prohibition on cluster munitions is under development, interpretation of the existing rules of international law is shifting against the legitimacy of these weapons. Attacks which cannot discriminate between civilian and military targets are prohibited under international humanitarian law; some have argued that cluster munitions are indiscriminate by design, others that they are particularly prone to being indiscriminate. Further, to be lawful, the damage to civilians caused by an attack must be proportionate to the military objective to be achieved, which requires an assessment of the foreseeable consequences of the attack. The legality of any use of cluster munitions is dependent on the assessment of the proportionality not only of the immediate impact of the attack on the civilians and their essential services, but also on other longer term foreseeable consequences.

Given recent precedents, any view that consequences beyond the immediate aftermath of a cluster munition attack are “too remote” to be foreseeable wilfully ignores the readily available evidence of the conflicts of recent times, notably Laos, Cambodia, Afghanistan, Kosovo, Iraq and Lebanon, which are littered with demonstrations of the severe long-term consequences of cluster munitions in continuing to kill and maim civilians for many years after they were used. Even for states that refuse to sign a new treaty banning these weapons, the use of cluster munitions is becoming increasingly more difficult.

Quincy Whitaker
Doughty Street Chambers
January 2008
Executive summary: The illegitimacy of cluster munitions

“When I arrived here in Lebanon after the war I noted again with dismay that cluster munitions seem to have been most effective against unarmed civilian populations and are used more as a weapon of terror than as a weapon of military supremacy... Frankly they are outmoded, outdated and a product of the cold war that has no moral relevance in the 21st century. They continue to kill and injure long after the conflict is over and should therefore be banned.”

Harry Leefe, Senior Liaison Officer, UNHCR Lebanon, 9 September 2006

Over the past 50 years, the use of cluster munitions has provoked consistent criticism over the associated death and injury caused to civilians. According to a recent report by Handicap International, cluster munitions can be directly linked to the recorded death or injury of more than 10,000 civilians. Their estimates of the actual number of casualties from cluster munitions rise as high as 100,000. Beyond this direct physical harm to civilians, cluster munition contamination has also been identified as denying use of land for post-conflict communities and draining humanitarian resources into remedial action. To date, cluster munitions have only been used in a limited number of conflicts and by a limited number of actors – their proliferation over recent decades sets the stage for much wider use in the future.

Whilst the use of cluster munitions is increasingly recognised to have caused a consistent pattern of civilian harm, only a few individual cases have been widely publicised and subject to legal rulings. This report looks at those individual cases and examines how the tools of both international and domestic law have been brought to bear. The scarcity of cases where legal action has been taken in response to cluster munition use probably derives from the vague terms of international law that have generally been considered applicable in such cases coupled with a lack of political will. However, the most recent examples suggest that where cluster munition use has been put before a court the weapons are recognised as being particularly problematic.

In the UK, public objection to the suffering that cluster munitions may cause to civilians appears to have contributed directly to three separate juries refusing to convict defendants in 2006 of conspiracy to commit criminal damage at RAF Fairford in advance of the 2003 bombing of Iraq. This is the first time that the expectation that these and other weapons would be used to commit war crimes has been used as a defence against criminal prosecution in an English court – and it was broadly successful. All three cases were subsequently retried, resulting in two acquittals and one conviction. In the U.S. state of Minnesota, three juries in 2003 and 2004 acquitted protestors of trespass charges at an arms manufacturer. The protestors successfully argued that they had a “claim of right” to enter the facility to deliver information about international law violations.

In June 2007, Milan Martić was found guilty of war crimes and crimes against humanity including the use of cluster munitions against Zagreb in 1995. The judgment of the court held that “the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of severe casualties.” Furthermore the court found that in view of these characteristics, “the presence or otherwise of military targets in Zagreb [was] irrelevant.” At one level this judgment should bolster demands that military commanders adopt as a presumption that the use of cluster munitions in or near areas of civilian population will be illegal. At another level, such a judgment should strengthen calls for the broad prohibition of these weapons – building greater recognition of the problems caused by these weapons at the time of use in addition to the legacy of post-conflict problems with which they are also associated.
A summary of the report

After an initial overview of some of the relevant legal frameworks and rules relating to the use of cluster munitions, this report addresses specific cases in a chronological sequence based on the outcomes of the legal processes.

Chapter 1 considers the extent to which States and individuals can be held legally responsible for the use and abuse of cluster munitions. It reviews regulation of cluster munitions under existing international treaties and international customary law, focusing on principles of discrimination, distinction, proportionality, and precautionary measures. It then looks at individual criminal responsibility under international humanitarian law, which covers the use of cluster munitions in internal and international armed conflict. Finally, the chapter addresses the issue of state responsibility for the unlawful use of cluster munitions.

Chapter 2 addresses the cluster bomb attacks on the northern Ethiopian town of Mekele by Eritrea in June 1998. These attacks are said to have caused more than 230 civilian casualties, including a large number of schoolchildren. Between 1998 and 2000, Eritrea and Ethiopia waged a massive war along several areas of their common border. A December 2000 agreement between the governments of the two countries established an independent claims commission to determine the losses, damage and injury each suffered as a result of alleged breaches of international law during the conflict. This commission found Eritrea liable for failing to prevent two of its military aircraft from dropping cluster bombs in the vicinity of Ayder school and its civilian neighbourhood in Mekele and for the resulting injuries and deaths. While the claims commission reached the right result in holding Eritrea liable, it should explicitly have addressed the nature and characteristics of the cluster munitions used as being inappropriate for use near populated civilian areas.

Chapter 3 looks back at the cluster bomb attack on the city of Niš and other similar attacks by NATO forces during Operation Allied Force in 1999. The 78-day bombing campaign, which aimed to push Serbian forces out of Kosovo and end the repression of the ethnic Albanian population in that province, saw widespread use of cluster munitions by the Netherlands, the United Kingdom and the United States. The attacks on Niš resulted in scrutiny in 2000 by the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) for possible war crimes and international humanitarian law violations, but no charges were brought. In reaching its decision to withhold indictment, the Prosecutor relied on general representations made by NATO with little or no further investigation. The Prosecutor also distinguished NATO’s cluster munition use (which did not intentionally target civilians) from the alleged use of cluster munitions by Milan Martić in 1995 against Zagreb. As discussed in Chapter 6 of this report, the initial indictment of Martić in 1996 alleged intentional use of cluster munitions against civilians. The 2007 conviction of Martić for war crimes and crimes against humanity made it very clear that even if Martić had been attacking military targets, the use of cluster munitions in the heart of a civilian concentration was nonetheless illegal.

Chapter 4 considers the legality of the use of cluster munitions in Lebanon during the Israeli invasion in the summer of 2006. Several million submunitions were scattered over the south of the country in the course of only a few days just prior to the end of the conflict. No one has, so far, been charged with any criminal offences relating to this use even though a mission of experts designated by the UN Human Rights Council believed they found clear evidence of serious breaches of international humanitarian law in the use of these weapons. Despite a finding by the U.S. State Department in January 2007 that “there were likely violations” by Israel of an arms pact concerning the use of cluster munitions sold to it by the U.S., no additional action has been taken by the U.S. administration or Congress to penalize Israel. Two internal Israeli investigations have been undertaken. First, an internal investigation into cluster munition use by the Israeli Defence Forces reportedly is complete but has yet to be released. Second, the Israeli government-appointed Winograd Commission was tasked with the larger task of preparing a report on the conduct of Israel’s government and Israel Defense Forces (IDF) during the conflict. In its final report, The Commission stated that although they did not find evidence of deliberate use of these weapons in contravention of international law, there was a lack of clarity regarding the acceptable or appropriate use of these weapons. The Commission decided in November 2007 to not issue any findings of fact concerning individual actions, suggesting that no individuals would be held accountable for problems relating to the use of cluster munitions.
The chapter also considers allegations of much more limited use of cluster munitions by Hezbollah and the implications of non-state actors possessing and using the weapon. Hezbollah has denied using or possessing cluster munitions, despite mounting evidence to the contrary.

Chapter 5 considers the actions of juries sitting in judgment of anti-war activists protesting against the use of cluster munitions. In 2006 there were three high-profile cases in the United Kingdom in which a total of five civilians charged with criminal offences explicitly used the illegitimacy of cluster munitions as a defence. Each involved break-ins to a Royal Air Force base with intent to disarm United States Air Force aircraft the defendants believed would be used to commit war crimes in military operations against Iraq. The report describes the conduct of two of the original criminal cases, and the role that cluster munitions played in their outcome. In 2003 and 2004, juries in the U.S. state of Minnesota acquitted protestors of trespass charges at Alliant Techsystems, an arms manufacturer. The protestors claimed the manufacturers had violated international law by producing indiscriminate weapons such as cluster munitions. This report raises the possibility that the actions of British and American juries in accepting the international law defences of these protestors may constitute a form of “public conscience” under the Martens Clause.

Chapter 6 looks at an instance of an individual being held criminally responsible for use of cluster munitions in violation of international humanitarian law. Milan Martić, an erstwhile ethnic Serb leader in a breakaway republic in Croatia, was tried before the International Criminal Tribunal for the former Yugoslavia. Among many charges, he was accused of unlawful attacks on the Croatian capital, Zagreb, with cluster munitions in early May 1995. He was found guilty in relation to this and other crimes in a verdict of 12 June 2007. The case demonstrates that advance awareness of cluster weapon characteristics when used in densely populated civilian areas (i.e., their wide area effects and considerable inaccuracy) can lead to criminal liability. The verdict in the case also indirectly addressed a counter argument often made by proponents of “responsible” use of cluster, namely that barring use of cluster munitions will lead to greater use of unitary warheads in civilian areas. The court rejected that defence argument, leading to the conclusion that restricting cluster munition use should not be seen as a green light to use even more destructive weapons indiscriminately. Finally, while the prosecution and the court could have more explicitly addressed the issue of cluster munitions duds, it did find Martić guilty for the death and serious injury caused by unexploded ordnance in the immediate aftermath of a cluster munition attack. The characteristics of the multiple launch rocket system used against Zagreb are quite similar to those found in stockpiles around the world.

In sum, under the general rules of international humanitarian law, scope for the legitimate use of cluster munitions is waning. While there has often been a lack of political will to confront cluster munition use, legal processes in a variety of venues have begun to take into account the humanitarian challenges raised by these weapons. These processes move slowly, however, and are being overtaken by more sweeping developments in treaty law taking place in the Oslo process to ban cluster bombs.
This chapter considers the extent to which states and individuals can be held to account for an unlawful use of cluster munitions. To date, no international treaty has formally prohibited the use of cluster munitions, although the call by Norwegian Foreign Minister (see above) has already garnered support from approximately 100 governments. Currently, however, their use is – as with all weapons – subject to the laws of armed conflict, typically referred to as international humanitarian law (IHL).

Current regulation of cluster munitions under international treaties

Under international humanitarian law, the use of cluster munitions in armed conflicts is generally governed by the law applicable to all ‘means’ of combat. For international conflicts the most recent formulations are found in the 1977 Additional Protocol I to the Geneva Conventions whereas the 1977 Additional Protocol II provides rules applicable to non-international (internal) armed conflicts.

The protection afforded by the law in international armed conflicts is the stronger and more elaborate, although fundamental principles – notably the principle of distinction, which prohibits attacks on civilians – apply in both situations. Thus, Article 51 (2) of Additional Protocol I provides that: “The civilian population as such, as well as individual civilians, shall not be the object of attack.” The same protection in internal armed conflicts is afforded by Article 13 of Additional Protocol II.

Article 51(4) of Additional Protocol I states that “indiscriminate attacks are prohibited” and defines indiscriminate attacks as follows:

(a) those which are not directed at a specific military objective;

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

It has been questioned by various legal experts whether the wide-area effects and post-conflict hazard created by the use of cluster munitions are not such as to make the weapon or its use inherently indiscriminate, although the predominance of legal opinion among states, has been that they are not. Landmine Action

“[The Oslo Conference has been very successful, as participants have agreed to take concrete action to address the problems of cluster munitions. We have agreed that the humanitarian problem is so urgent that we need to take action NOW... We are now prepared to develop a new, legally binding instrument by 2008... The door is open for those who share our commitment to concluding a new instrument by 2008.”

Raymond Johansen, Norwegian Deputy Minister of Foreign Affairs, February 2007
has previously noted that the law as currently formulated is open to wide interpretation with wholly different opinions being supported by reference to the current rules. It is, though, clearly unlawful to target civilians or civilian objects with cluster munitions or to fail to direct cluster munitions against a lawful military objective, just as is the case with any other weapon.

To implement these provisions in the course of an armed conflict, Article 57 of Additional Protocol I requires that parties to a conflict take certain precautions in attack, including “all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”. This demands that thought be given to the foreseeable consequences of an attack. But what is foreseeable?

For example, although the UK Ministry of Defence’s The Manual of the Law of Armed Conflict states that “in deciding whether an attack would be indiscriminate, regard must also be had to the foreseeable effects of attack,” it has been argued that humanitarian consequences are not foreseeable beyond the initial few hours following the attack. Thus, for example, Professor Christopher Greenwood, a UK international lawyer, has argued that only the immediate threat to the civilian population should count in determinations of proportionality: “The risks posed by explosive remnants of war (ERW) once the immediate aftermath of an attack has passed are too remote to be capable of assessment at that time.”

This view has been strongly challenged by the International Committee of the Red Cross and other international lawyers. Although the 3rd Review Conference of the Convention on Certain Conventional Weapons (CCW) agreed in November 2006 that the foreseeable effects of ‘explosive remnants of war’ (ERW) on civilian populations are factors to be considered in applying the international humanitarian law rules on proportionality in attack and precautions in attack, what is to be considered foreseeable remains open to question. This is a particular point of concern in light of the absence, to date, of any substantive state efforts to evaluate the likely ERW impact of different weapon systems. In the case of cluster munitions there has, until recently, been little in the way of state-led efforts to evaluate civilian deaths and injuries from the use of these weapons, let alone consideration of the longer-term effects of unexploded submunitions on agricultural productivity.

The explicit statement by the CCW does however raise issues regarding obligations under Article 36 to Additional Protocol I for new weapons. Article 36 states that in “the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law.”

Following the end of armed hostilities, Protocol V to the Convention on Certain Conventional Weapons, which entered into force on 12 November 2006, makes a State Party responsible for clearance of all explosive remnants of war in territory under its control as well as requiring it to take other measures to protect the civilian population, such as through the provision of warnings and risk education. Where a party to a conflict is not, or is no longer, in control of the affected territory, it is required to provide assistance (technical, financial, material or human resources) for clearance, including through the provision of information on the munitions that it used.

Protocol V also contains a non-legally-binding technical annex that addresses “generic preventive measures”; these include a call to design production processes so as to achieve the greatest reliability of munitions and to “examine ways and means of improving the reliability of explosive ordnance that [a State Party] intends to produce or procure, with a view to achieving the highest possible reliability.”

Customary international law

Customary law, binding on all states, recognises the principle of distinction set out above in both international and internal armed conflicts, thereby requiring that in the use of means and methods of warfare a distinction be made between military objectives and civilian objects. The principle of proportionality is also generally agreed to be applicable to both scenarios, though the tenets of that principle and its application continue to be the subject of dispute among states.
**Individual criminal responsibility**

In an international armed conflict, Additional Protocol I stipulates that grave breaches of the Protocol are subject to compulsory universal jurisdiction. That means, individuals alleged to have committed war crimes, wherever they may be found, must be put on trial or handed over to a more appropriate jurisdiction for trial. Targeting civilians with cluster munitions or using the weapons indiscriminately – without taking due measures to prevent harm to civilians or civilian objects – are grave breaches of the Protocol.

The International Criminal Court is a possible forum for prosecution of those individuals alleged to have used cluster munitions indiscriminately. In addition, if a treaty prohibiting cluster munitions enters into force and is widely accepted, the use of the weapons could be added to the jurisdiction of the Court as a war crime. In the long-term, this could prove an important support to implementing a comprehensive ban on cluster munitions.

**State responsibility**

Under international humanitarian law, states are responsible for violations committed by their armed forces or agents in the course of an international armed conflict. Thus, Article 91 of Additional Protocol I stipulates that: “A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” This compensation is, however, payable to the affected State not the individuals who have been harmed by the unlawful conduct.

No similar provision exists for reparation of violations of international humanitarian law during an internal armed conflict, although there may be a duty to make reparation under the provisions of international human rights law. Indeed, the International Law Commission has stressed that such obligations may also exist towards persons or entities other than states, for example in the case of “human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a state.”

**Manufacturer responsibility**

The manufacture of products resulting in death and grave injury due to faulty design or production often results in civil or criminal liability of corporations. In the area of arms manufacturing, however, states have created nearly impenetrable layers of legal protection to shield even negligent design and production from civil or criminal prosecution.
Chapter 2: The 1998 cluster bomb attack on Mekele town by Eritrea

“The second bomb cut down the fathers, mothers and neighbours who had rushed to the playground upon hearing the children’s screams. All told, 48 people were killed, including 10 children under 15.”

Background

Between 1998 and 2000, Eritrea and Ethiopia waged a costly, large-scale international armed conflict along several areas of their common frontier. Article 5 of the Agreement between the Governments of Ethiopia and Eritrea of 12 December 2000 established an independent claims commission (the Eritrea-Ethiopia Claims Commission) regarding loss, damage and injury suffered by each of the parties as a result of alleged infractions of international law occurring during the conflict.

Allegations

On 5 June 1998, Ethiopia and Eritrea exchanged air strikes, Ethiopia attacking Asmara airport and Eritrea attacking Mekele airport. Each accused the other of striking first. Ethiopia’s claim against Eritrea was based not upon deaths, wounds and damage at the Mekele airport, but upon the allegation that Eritrean aircraft also dropped cluster bombs that killed and wounded civilians and damaged property in the vicinity of the Ayder School and the surrounding neighbourhood in Mekele town. Ethiopia stated that those bombs killed 53 civilians, including 12 school children, and wounded 185 civilians, including 42 school children.

Ethiopia filed a claim with the Eritrea-Ethiopia Claims Commission relating to these and other events on 12 December 2001. Further statements and evidence were lodged with the Commission by both sides between April 2002 and October 2003.

Evidence

Ayder School and neighbourhood are located within the town of Mekele, on its north-west side. Mekele airport is located approximately seven kilometres from Ayder on high ground outside the town to the south-east. In its claim before the Commission, Ethiopia alleged that Eritrea had intentionally targeted a civilian neighbourhood in violation of international law. Eritrea vigorously denied the allegation. While Eritrea did acknowledge that one of its aircraft dropped cluster bombs in the vicinity of the Ayder School, it contended that this was an accident incidental to legitimate military operations, not a deliberate attack, and consequently not a basis for liability.

The parties agreed on certain facts before the Commission and vigorously disputed others. What was agreed upon was the following:

Eritrea sent four separate single aircraft sorties to Mekele on 5 June 1998. The aircraft were Italian-made MB-339’s, each flown by a single pilot. These aircraft were said to have computerised aiming systems that are designed to release bombs at the proper time to hit a target when the pilot sees it aligned with a “heads up” display in the cockpit and pushes a bomb release switch.

Figure 1.
A cluster bomb container following the attacks on Mekele
The first sortie had no bombs and strafed the airport at about 2.45pm, causing some casualties and damage. The following three sorties were armed with cluster bombs. The second sortie dropped cluster bombs on or near the airport runway at about 3.30pm. The third sortie dropped its two cluster bombs over the Ayder School and neighbourhood at about 5.00pm.

Eritrea had instructed the pilots of all four sorties to follow a flight path that took them directly over densely populated residential areas of Mekele city.

Other important facts were not agreed by the parties, and the Commission was obliged to decide those facts necessary to resolve the claim. The central disputed issue was whether there was one bombing attack that hit the Ayder School area, as Eritrea admitted, or two, as contended by Ethiopia.

Eritrea asserted that the third sortie was instructed to attack Ethiopian anti-aircraft defences north-west of the airfield and that the bomb release computer had been set accordingly. Eritrea stated that the pilot of the third sortie said that he had succeeded in hitting his target. Eritrea also asserted that the pilot of the fourth sortie was instructed to attack the airport and that his bomb release computer had been set accordingly. Eritrea stated that the pilot of the fourth sortie, which was over Mekele at about 6.00 pm, said that he had succeeded in hitting his target.39

In stark contrast, Ethiopia asserted that the fourth sortie did not drop a bomb on the airport and dropped at least one cluster bomb on the same Ayder neighbourhood as did the third sortie; and Ethiopia argued that, given the extreme odds against two errors resulting in bombing the same place, the Commission must conclude that the Ayder School and neighbourhood were deliberate and unlawful targets of those two sorties.39

Eritrea denied that the fourth sortie dropped a bomb on the Ayder neighbourhood. It pointed out that it had no reasons to target civilians and that it had strong reasons to target the Mekele airport, because Ethiopia’s stronger air force, operating from there, might be able to put Asmara airport – which it said was its only airport – out of operation.40

The Commission concluded that the fourth sortie dropped at least one cluster bomb on the Ayder neighbourhood and that there is no evidence that it dropped any bomb on or near Mekele airport. It found testimony by witnesses placing the strikes one hour apart “compelling, including testimony before the Commission by a witness to the first bombing who became an injured victim of the second. This testimony is consistent with video evidence, hospital records and a Reuters article dated June 5 by journalists in Mekele that day that refers specifically to a bombing in the town at dusk as well as one earlier in the afternoon.”32

Consequently, the Commission held that Eritrea’s four sorties resulted in two strikes hitting Mekele airport and two strikes hitting the Ayder neighbourhood in Mekele. Nevertheless, the Commission was not prepared to draw the conclusion urged by Ethiopia that the attacks on civilians had been intentional, as it was not convinced that Eritrea deliberately targeted a civilian neighbourhood. It observed that Eritrea had obvious and compelling reasons to concentrate its limited air assets on Ethiopia’s air fighting capability – its combat aircraft and the Mekele airport, which was within 20 to 25 minutes’ flight time from Asmara. Moreover, it did not find it credible that Eritrea would see advantage in setting the precedent of targeting civilians, given Ethiopia’s apparent air superiority.39

The exact reasons for the events of 5 June 1998 may never be known. Eritrea did not make available to the Commission any evidence from the pilots and refused to identify them, although Eritrea did acknowledge that the third sortie was that pilot’s first mission.44 If the Commission is correct in its assessment, then we must conclude that a grave error was made by the two pilots.

Indeed, the Commission acknowledged “the long odds against two consecutive sorties making precisely the same targeting error, particularly in view of Eritrea’s representation that the two aircraft’s computers were programmed for two different targets. However, the Commission must also take into account the evidence that Eritrea had little experience with these weapons and that the individual programmers and pilots were utterly inexperienced, and it recognizes the possibility that, in the confusion and excitement of June 5, both computers could have been loaded with the same inaccurate targeting data. It also recognizes that the
pilots could reprogram or could drop their bombs without reliance on the computer. For example, it is conceivable that the pilot of the third sortie simply released too early through either computer or human error or in an effort to avoid anti-aircraft fire that the pilots of the previous sorties had reported. It is also conceivable that the pilot of the fourth sortie might have decided to aim at the smoke resulting from the third sortie.\(^3\)

The Commission believed that the governing legal standard for the claim was best set forth in Article 57 of Additional Protocol I to the Geneva Conventions. This provision requires that all feasible precautions to prevent unintended injury to protected persons must be taken in choosing targets, in the choice of means and methods of attack and in the actual conduct of operations (see Box 1 below). The Commission did not question either the Eritrean Air Force’s choice of Mekele airport as a target, or its choice of cluster bombs as weapons.\(^3\) However, the Commission expressed serious concerns about the manner in which the bombing operations were carried out. It declared that the failure of two out of four bomb runs to come close to their intended targets “clearly indicates a lack of essential care in conducting them, compounded by Eritrea’s failure to take appropriate actions afterwards to prevent future recurrence.”\(^3\) The Commission received no evidence indicating any changes in Eritrean training or doctrine aimed at avoiding possible recurrence of what happened in the third and fourth sorties on 5 June 1998.\(^3\)

**Figure 2.**
The terrible human cost of the cluster bomb attacks on Mekele

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**BOX 1. ARTICLE 57 OF 1977 ADDITIONAL PROTOCOL I TO THE GENEVA CONVENTIONS**

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:
   
   (a) those who plan or decide upon an attack shall:

   (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

   (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;

   (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

   (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

   (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

*Continued on page 12*
Judgment

From the evidence available to it, the Commission was unable to determine why the bombs dropped by the third and fourth sorties hit the Ayder neighbourhood. The Commission had no access to the pilots, and the Deputy Air Commander who did testify indicated that he had not even interviewed the pilot of the fourth sortie. It observed that “all of the information critical to that issue was in the hands of Eritrea or could have been obtained by it, and Eritrea did not make it available.”

In those circumstances, the Commission felt that it was “entitled to draw adverse inferences” reinforcing the conclusions it had already drawn that not all feasible precautions were taken by Eritrea in its conduct of the air strikes on Mekele on 5 June 1998.

Accordingly, the Commission found Eritrea liable for failing to take all feasible precautions to prevent two of its military aircraft from dropping cluster bombs in the vicinity of Ayder school and its civilian neighbourhood and for the resulting injuries and deaths.

Despite a high level of civilian casualties, the apparently ‘accidental’ nature of this incident meant that the characteristics of cluster munitions as a category of weapons were not scrutinised.

Right result, incomplete analysis

The Commission reached the right result by holding Eritrea accountable for failing to take reasonable precautions. While urged by Ethiopia to hold that the attacks were intentional, the Commission found that the incompetence of the Eritrean pilots and programmers shielded Eritrea from such a conclusion. Failing to take remedial measures after the attack to prevent future mishaps also contributed to the liability finding. According to the decision, “The Commission received no evidence indicating any changes in Eritrean training or doctrine aimed at avoiding possible recurrence of what happened in the third and fourth sorties on June 5, 1998.” That rationale was a positive development, and may serve to limit cluster munition use in the future.

A rule requiring that reasonable remedial actions are taken after a grossly negligent action could have the salutary effect of encouraging governments to prevent deaths and injuries from cluster munitions in the future. Broader application of such a rule holds promise to restrain and limit the use of cluster munitions, as it could require militaries to take corrective measures about known failings of systems under their control. A failure to take corrective measures indicates a general callousness towards life and may be probative of general carelessness. Remedial measures also might properly be used as evidence of the feasibility of precautionary measures in the first place.

The analysis of the Commission’s decision, however, could have been strengthened had the Commission questioned the means of attack, i.e. the use of cluster munitions. Doing so would have underscored the failure to take reasonable precautions, as weapon characteristics making it dangerous to use in or around populated areas were publicly known prior to the attack.

Photographs taken at the scene suggest that the weapon used was the Chilean manufactured Cardoen CB-250K (see Figure 3). The characteristics of the CB-250-K were publicly known prior to the attack. Cardoen, the company that produced CB-250-K, started making cluster bombs in the 1980s. According to a
1997 report from *Jane’s Air Launched Weapons*, the CB-250-K cluster bomb contained 240 PM-1 bomblets that disperse over an elliptical shaped footprint of up to 50,000m² [equivalent to nearly ten football fields]. The weapon has no guidance system to direct it onto a specific target. Bomblets are about 40 cm in length and 5cm in diameter and can penetrate 150mm of steel armour, injure and kill people with shrapnel, and start fires with their incendiary zirconium element. The bomblets are also known to have a “high failure rate.”

Not available publicly was the circular error probable (CEP) of the CB-250-K, a standard measure of accuracy. The CEP has been defined as “the radius of a circle within which half of a missile’s projectiles are expected to fall.” While the CEP of the CB-250-K was not available, unguided cluster munitions of the same era were seen as needing upgrades to improve their accuracy. Additional fact-finding might have resulted in greater details about the nature of the weapon, including its CEP.

The use of a wide area munition near a “densely populated residential area” should have given pause, both due to the footprint size and the propensity for duds. While a satellite image of the area shows some unpopulated space between the airport and Mekele town, the same image shows that the village of Kwiha is less than a kilometre away from the airstrip (the stated target of the fourth sortie). The exact location of the alleged anti-aircraft defences supposedly targeted by the third sortie was not specified in the decision, but Eritrea alleged it was at least four kilometres from Ayder school, to the northwest of the airfield. The satellite image shows that area to be more or less clear of structures, but still within about 2 kilometers of Mekele (see Figure 4).

The nature of the proceedings and the intense dispute over the facts made it difficult for the Commission to reach conclusions. According to one commentator, “[t]he high standard of proof and the presentation of such conflicting evidence may have worked together to produce fewer findings of responsibility than either side had expected.” In a criminal investigatory context, as opposed to civil dispute between states, a prosecutor would likely have more powerful investigatory tools at her disposal to discover such evidence.
Chapter 3: The cluster bomb attacks on Niš by NATO in May 1999

Facts

Niš, the third largest city in Serbia and one of the most heavily bombed during the 1999 Operation Allied Force, suffered almost daily strikes in the course of the 78-day-long air campaign. In addition to numerous bombings of the industrial zone, the city’s airport – ‘Constantine the Great’, a military installation at the time – was bombed repeatedly. An array of weapons were released against the airport, which is located more than three kilometres away from the city centre, including many thousands of submunitions.

In addition to the persistent strikes against the airport and the town’s industrial zone, a number of cluster strikes hit the town centre and the residential suburb of Duvanište, causing civilian casualties. The first such attack fell on Friday, 7 May 1999. At 11.20am, an unknown number of cluster bombs opened over two of the town’s most important and most frequented sites – the market place and the city hospital. In total, the 7th May cluster strikes on Niš left 14 civilians dead – seven in the vicinity of the market place, and another seven in two streets near the hospital. A further 27 people were seriously injured and there are records of 30 others who received some treatment but were released from the hospital due to the need to prioritise new patients. According to NPA, “[i]n some cases, people had their injuries/fragment wounds cleaned without a thorough check-up, discovering the remaining submunition fragments in the muscle tissue only at a later date.”

The 7th May attacks were confirmed by Javier Solana, NATO’s Secretary General, in a press conference the following day: “Damage to the market and clinic was caused by a NATO weapon which missed its target. The strike was directed against the Niš airfield utilising cluster munitions... Civilian casualties were never intended and NATO regrets the loss of life and injuries inflicted.” Major General Jertz, Spokesperson for the Supreme Headquarters Allied Powers, Europe (SHAPE), acknowledged that “some of the clusters obviously did go astray” and speculated that this was “maybe because of a technical malfunction or they could have been inadvertently released.”

Human Rights Watch reported U.S. Air Force sources as having claimed that a single cluster bomb had failed to open over the intended target, the airfield, and opened right after release, dispersing submunitions over a wide area of the town. However, as Norwegian People’s Aid observes, “The probability of one cluster bomb container opening and spreading submunitions over two separate areas of the town at least two kilometres apart is low, considering the space affected in both of the locations. Accordingly, at least two containers must have been used, and possibly more.” Figure 5 shows the distances between the intended target (Niš’s airport) as reported by NATO and the actual strike points in the centre of the city itself.

Useful comparisons can be made between the Niš incident and the cluster bomb strikes on Mekele, Ethiopia, discussed in the previous chapter. In both incidents, aircraft armed with cluster bombs intended to strike airports (as well as air defence systems) very near populated areas. In both cases, large numbers of civilians were killed by cluster bombs allegedly gone astray – in Niš due to alleged mechanical malfunction, in Mekele due to alleged pilot or programmer error. In neither case were fact finders given access to the pilots or the aircraft or internal investigative reports. Yet in the Mekele case, Eritrea was held liable for failing to take feasible precaution in violation of Article 57 of the Additional Protocol I.

On 8 May, the same day that Javier Solana was regretting the previous day’s errors, a new cluster strike hit the city, this time in its suburbs of Ratko Jović and Novi Komren. Fortunately, there was no civilian loss of life. After the attacks, the area was closed off and cleared within 48 hours by the army and police. But four days later, on 12 May, another residential area of Niš was hit with BLU-97 submunitions (see Figure 6), with victims once more among the civilian population. At 2.55pm – the local rush-hour – Duvanište, a densely populated suburb, was hit with the contents of an
unknown number of cluster bombs. Submunitions fell along Mayakovski and Sreten Mladenović streets and the river Nišava, detonating upon impact with cars, concrete, buses and buildings.

The police and civil protection units estimate that an area of at least two square kilometres must have been affected by the attack, since duds were found in neighbouring suburbs of Krivi vir and Krive livade, as well as in Lenin Boulevard, United Nations Park and the archaeological site of Medijana. The material damage was substantial. Dozens of buses, thirty cars and an unknown number of houses and buildings were damaged. Three schools were heavily damaged, but fortunately, since this was after the end of the school year, no children or teachers were present. A fourth, Ćele Kula primary school, escaped damage as the four submunitions that fell right in front of the school entrance did not detonate upon impact with the concrete.

Even though many people were out in the streets, no one was killed in these attacks. But three people were seriously injured and some ten others wounded, all of whom were treated at the surgical ward of the City Clinic. It has been claimed that soon after the Niš incident the White House issued a directive to restrict further cluster-bomb use by U.S. forces. However, NATO bombing records show extensive cluster munitions use through to the end of the conflict so any restriction appears to have been short-lived.

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Figure 5. A map of Niš showing the areas of the city centre struck by cluster munitions in the 7 May 1999 bombing in relation to the airport. © NPA, 2007

Figure 6. A map of Niš showing the suburb of Duvanište, which was hit by cluster munitions on 12 May 1999, and the airport, approximately seven kilometres away. © NPA, 2007
A letter from the Dutch Ministry of Defence in October 2000 suggests that they did suspend use of cluster munitions during the campaign due to concern about unintended civilian harm but it is not clear at what point this was done:

“As long as the operational commander of the specific peace operation sticks to the mandate and the conditions, there is no direct Dutch interference with the operational exercise of the unit. But if there are weighty reasons the government can – in the mean time – impose additional conditions. As was the case during the Kosovo-war in which, due to the risks of unintended collateral damage, it was decided to suspend the use of cluster munitions by Dutch forces.”

By contrast, the UK Ministry of Defence observed that:

“We have been criticised for continuing to use cluster bombs after the U.S. have ceased to use them for safety reasons. The type of cluster bomb used by the U.S. was discovered to have a fault and was temporarily withdrawn from service, being returned to service shortly thereafter for use until the end of the conflict. The UK uses a different type, which continued to function normally, and there was thus no reason for it to be withdrawn.”

Allegations of war crimes and the legal process

The attacks on Niš and other apparently civilian areas led to an investigation by the International Criminal Tribunal for the Former Yugoslavia (ICTY) into possible war crimes. Thus, the Office of the Prosecutor of the ICTY established a committee to review the NATO bombing campaign against the Federal Republic of Yugoslavia in May 1999. The Committee stated in full that:

Cluster bombs were used by NATO forces during the bombing campaign. There is no specific treaty provision which prohibits or restricts the use of cluster bombs although, of course, cluster bombs must be used in compliance with the general principles applicable to the use of all weapons. Human Rights Watch has condemned the use of cluster bombs alleging that the high “dud” or failure rate of the submunitions (bomblets) contained inside cluster bombs converts these submunitions into antipersonnel landmines which, it asserts, are now prohibited under customary international law. Whether antipersonnel landmines are prohibited under current customary law is debatable, although there is a strong trend in that direction. There is, however, no general legal consensus that cluster bombs are, in legal terms, equivalent to antipersonnel landmines. It should be noted that the use of cluster bombs was an issue of sorts in the Martić Rule 61 Hearing Decision of Trial Chamber I on 8 March 1996. In that decision the Chamber stated there was no formal provision forbidding the use of cluster bombs as such (para. 18 of judgment) but it regarded the use of the Orkan rocket with a cluster bomb warhead in that particular case as evidence of the intent of the accused to deliberately attack the civilian population because the rocket was inaccurate, it landed in an area with no military objectives nearby, it was used as an antipersonnel weapon launched against the city of Zagreb and the accused indicated he intended to attack the city as such (paras. 23–31 of judgment). The Chamber concluded that “the use of the Orkan rocket in this case was not designed to hit military targets but to terrorise the civilians of Zagreb” (para. 31 of judgment). There is no indication cluster bombs were used in such a fashion by NATO. It is the opinion of the committee, based on information presently available, that the OTP should not commence an investigation into use of cluster bombs as such by NATO.”

In the ICTY's annual report for 2000, the Office of the Prosecutor noted that it had received “many allegations of violations of international humanitarian law by... NATO forces during the bombings of the Federal Republic of Yugoslavia.” Given the Tribunal's jurisdiction over all war crimes committed throughout the territory of the former Yugoslavia, the Prosecutor [Carla Del Ponte] considered herself “duty-bound” to assess the allegations. However, in June 2000, the Office of the Prosecutor reported that:

A working group, established in May 1999 by the former Prosecutor, comprising military lawyers, military analysts and other experts to examine and assess all complaints and allegations and accompanying material, undertook to examine
the material. Following a full consideration of all complaints and allegations, the Prosecutor concluded that there was no basis for opening an investigation into any of these allegations or into other incidents related to the NATO bombing. She further concluded that although some mistakes were made by NATO she was satisfied that there had been no deliberate targeting of civilians or unlawful military targets by NATO during the bombing campaign.\footnote{66}

This analysis of cluster bomb use left much to be desired. The Committee report avoided analysis of the known factual characteristics of the cluster munitions in use (the U.S. CBU-87 and the British RBL-755) that may make them indiscriminate weapons, particularly when used in populated areas. As a result of the first Gulf War, for instance, the U.S. Air Force was well aware of accuracy problems, wide area effects, and dud rates associated with the CBU-87.\footnote{67} The Committee’s methodology, now seven years on, continues to attract harsh critique. For example, scholars have criticized it for accepting NATO’s account of incidents, which often did not respond to specific inquiries for information.\footnote{68} A formal criminal investigation likely would have prompted greater cooperation from NATO forces. The analysis also seems to avoid consideration of indiscriminate or disproportionate attacks.

The Committee also took great pains to distinguish NATO’s use of cluster munitions from that of Krajina Serbian rocket attacks on Zagreb in 1995 as then being prosecuted in the Martić case. The Trial Chamber’s Martić judgment in 2007 directly undermines the rationale of the Committee’s 2000 report:

The [Martić] Defence argues that there were military targets in Zagreb at the time of the attacks on 2 and 3 May 1995, including the Ministry of Interior, Ministry of Defence, Zagreb/Plešo airport, which had a military purpose, and the Presidential Palace... However... the presence or otherwise of military targets in Zagreb is irrelevant in light of the nature of the M-87 Orkan.

The evidence shows that the M-87 Orkan was fired on 2 and 3 May 1995 from the Vojnič area, near Slavsko Polje, between 47 and 51 kilometres from Zagreb. However, the Trial Chamber notes in this respect that the weapon was fired from the extreme of its range. Moreover, the Trial Chamber notes the characteristics of the weapon, it being a non-guided high dispersion weapon. The Trial Chamber therefore concludes that the M-87 Orkan, by virtue of its characteristics and the firing range in this specific instance, was incapable of hitting specific targets. For these reasons, the Trial Chamber also finds that the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of severe casualties. By 2 May 1995, the effects of firing the M-87 Orkan on Zagreb were known to those involved.\footnote{69}

What were those characteristics?: a propensity to miss its target and a footprint of about two hectares (or about 150m x 200m).\footnote{70} The characteristics seized upon by the ICTY Trial Chamber in the Martić case in 2007 therefore focused most clearly not on the dud rate of the bomblets, but upon the indiscriminate characteristics of cluster munitions in their most immediate use. A typical footprint for the CBU-87 is broadly similar to that of the Orkan rocket used against Zagreb. As noted above, the unguided version of the CBU-87 has considerable accuracy problems.\footnote{71}

As a final comment on these incidents in Nis, it should be noted that it has never officially been confirmed whether it was US or Dutch planes that dropped the cluster munitions that caused these civilian casualties. Although Dutch parliamentary answers suggest it must have been US planes, this has not been formally stated. This lack of clarity raises concerns about how effectively the conduct of individual states can be critiqued when they are taking part in joint operations.
The use of cluster munitions during the conflict

In its invasion of Lebanon in July–August 2006 the Israeli Defence Force (IDF) undertook widespread use of ground and aerially delivered cluster munitions. Based on media reports, UN officials estimate that Israel fired approximately four million U.S. and Israeli-manufactured cluster bomblets on Lebanon, although Israel itself admits to firing only one million. More than 35 square kilometres of land was found to have been contaminated by cluster munitions. As of 13 April 2007, 144,049 individual submunitions had been located and destroyed. Hezbollah are also reported to have used over a hundred Chinese-manufactured cluster munition rockets during the conflict and were accused of firing them into civilian areas in Israel.

In an analysis of the impact of cluster munitions immediately after the conflict Landmine Action concluded that cluster munitions did not appear to have had any significant impact toward achieving the military aims stated by Israel during the war. Some 60 per cent of Israeli cluster strikes were reported to have hit in or near built-up areas. Moreover, the massive and widespread use of cluster munitions across south Lebanon did not seem to accord with any recognisable legitimate military strategy. The head of an Israeli Defence Force rocket unit posted in Lebanon during the war was quoted in an Israeli daily newspaper, in September 2006, as saying “what we did was insane and monstrous, we covered entire towns in cluster bombs.”

Two weeks after the ceasefire, as appreciation of the extent of this contamination started to develop, the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Jan Egeland, described the use of cluster munitions by Israel as “shocking” and “to me completely immoral” as 90% of the cluster bombs strikes occurred within the last 72 hours of the conflict, estimating that tens of thousands of unexploded submunitions remained. Three weeks later the UN Mine Action Coordination Centre in South Lebanon revised that estimate suggesting that the number of unexploded submunitions may be as high as 1 million.

Although some warnings were delivered by Israel about impending attacks, significant numbers of civilians were killed and injured by unexploded submunitions at an average of around four casualties each day during the first month after the ceasefire. Approximately 35 per cent of the casualties from unexploded submunitions were children. Furthermore, in the months immediately after the ceasefire 97 per cent of all casualties from unexploded ordnance and mines were caused by cluster munitions.

In terms of socio-economic impact, cluster munitions seriously affected livelihoods by blocking water supplies, disrupting work to restore power lines and preventing excavation of rubble and reconstruction efforts. Unexploded cluster munitions prevented or endangered the harvest of remaining tobacco, olive, wheat and fruit crops and prevent or endanger the replanting of winter grain and vegetable crops.

The Israeli Chief of Staff, Dan Halutz, declared publicly in December 2006 that the IDF’s employment of cluster munitions during the recent war was “disappointing”, claiming that the Artillery Corps and rocket battalions that fired the cluster munitions deviated from the rules he had ordered the IDF to comply with. Moreover, at the time of writing Israel had not provide the UN with precise data on the places the IDF fired upon, which would be of significant assistance to clearance operations.

In a newspaper article, a reserve officer in the Israeli Artillery Corps disputed that field level troops initiated cluster rocket fire in violation of higher orders stating that: “It is completely false that we fired cluster munitions on our own initiative... No one went wild and started firing off cluster bombs.” The officer also stated that suppression of Hezbollah rocket fire was also not the purpose of the cluster munition use:

Contrary to what is generally thought, most of the cluster rockets were not fired in retaliation...
for Hezbollah’s firing of Katyushas or other rockets. Most of the firing, the reserve artillery officer says, was initiated by the IDF. The reason is the imprecision of MLRS (Multiple Launch Rocket System) rockets. “You cannot use an MLRS to hunt down Hezbollah rocket-launchers,” explains Ariel. “Artillery cannon or the Israel Air Force is more accurate and quicker than we are. We cannot compete with either cannons or the IAF.”

According to Ariel, only a small percentage of the MLRS rockets released were retaliatory fire. He notes that the MLRS rockets’ principal function is to “keep field cells under fire,” and this is what his battalion was instructed to do. Each MLRS battery was assigned a specific “field cell,” each measuring one kilometer in radius, and instructed to fire cluster rockets at that field cell from time to time to deter Hezbollah personnel from entering it...

According to Ariel, to achieve a “large-scale scattering” of cluster bombs in the field, use was made of American rockets, manufactured by Lockheed Martin, whose margin of deviation is one kilometer. Thus, his battalion employed fewer RAMAM rockets (Hebrew acronym for “trajectory-adjusted rockets”), which are considered much more precise.44

It is worth noting that the one kilometre margin of deviation reported here for the American rockets used is quite similar to the margin of deviation of the Yugoslav rockets used in the attack on Zagreb in 1995. That attack is the subject of detailed discussion in Chapter 6 of this report.

A year after the war, the Israeli Ministry of Foreign Affairs continued to defend the use of cluster munitions during the conflict:

Clearly, as in the case of all arms, the use of cluster munitions must be in accordance with the principles of the law of armed conflict. In the course of the conflict, CBUs were used as part of Israel’s response to the unique threat posed by Hizbullah. In particular, the nature of the campaign, the massive scope of missile attacks – including CBU attacks – against Israeli population centers, and the fact that missile launchers were deliberately and expertly camouflaged in built-up areas and areas with dense vegetation, were all factors in the decision to use this type of weapon. The decision to use CBUs to neutralize the missile attacks was only made after other options had been examined and found to be less effective in ensuring maximal coverage of the missile-launching areas. In practice, the operational effectiveness of CBUs was clearly shown, resulting in a disruption of missile attacks against Israeli population centers.47

Investigations into alleged violations

Allegations of cluster bomb use by Hezbollah and humanitarian law implications

Hezbollah are reported to have used a total of at least 118 Chinese-manufactured cluster munition rockets containing over 4,600 submunitions during the conflict and were also accused of firing them into civilian areas in Israel.48 Evidence of stockpiled Chinese made cluster rockets was also found in south Lebanon following the war.49 Hezbollah has denied the use of cluster munitions.93 Human Rights Watch has raised concerns about the legality of the use of these and other weapons against residential areas in Israel and called for further investigations.49 Both Hezbollah and the Lebanese government condemned the report by Human Rights Watch.92

The prospect of the proliferation of cluster munitions to non-state actors is troubling enough. The use of Hezbollah cluster munitions, albeit alongside much heavier use by Israel, raises the possibility of what might be termed “mutually assured duds”. International humanitarian law might actually be misused as a “ratchet” to increase rather than decrease the use of cluster munitions. If a party to a conflict believes the other side is going to use difficult-to-target cluster munitions with high dud rates, they may rightly conclude that such weapons may not only hit military targets but threaten their own civilians as well in both the short and longer term. In response, that party, in making proportionality considerations, might rightfully say that to prevent short and long term dangers to their own civilians, it needs to target the use of cluster munitions by its opponents with its own cluster munitions (balancing the danger to its own civilians against the possible danger to the civilians of opponents).
Internal Israeli investigations

Two Israeli investigations have been undertaken into cluster munition use by Israel during the war.

The Winograd Commission

On September 17, 2006, the Israeli government appointed a commission of inquiry to “look into the preparation and conduct of the political and the security levels concerning all the dimensions of the Northern Campaign which started on July 12th 2006". Headed by former justice Eliyahu Winograd, the so-called Winograd Commission issued a preliminary report on April 30, 2007. That report did not specifically address cluster munitions, focusing instead on errors of judgment by the prime minister, the minister of defence and the chief of staff of the IDF.

In response to accusations that the IDF committed war crimes by dropping cluster bombs on civilians in southern Lebanon the commission’s chairman announced in July 2007 that the panel’s final report would examine the war’s events in relation to the norms of international law. On 4 November 2007, the Commission explicitly indicated that it would not include “facts, conclusions or recommendations involving individuals” due to its goal of issuing the report by the end of the year. In order to have issued such personal facts and conclusions, the Commission would have had to first issue “cautionary letters” to individuals who could have been hurt by such reports, and allowed them examine evidence, hire attorneys, and argue their cases before the commission. The clarification followed petitions to the High Court of Justice, including one by the Military Defenders office which represents IDF members accused of crimes, calling on the committee to issue such letters of caution. Such a report reduces the likelihood that there will be any personal accountability for arguably illegal cluster munitions use by the IDF. Press reports in November 2007 predicted harsh criticism of the prime minister for actions taken in the final 60 hours of the war.

As this publication was going to print, the Winograd Commission released its long awaited report on the war on January 30, 2008. With respect to cluster munitions the Commission reported that although they did not find evidence of deliberate use of these munitions in contravention of international law, there was a lack of clarity regarding the acceptable or appropriate use of these weapons.

The Commission dedicated a special appendix to cluster bombs, determining that “cluster ammunition is not precise,” that bomblets “disperse over a large area, around the centre of a target” and that “some of the bomblets do not explode on contact and are likely to explode and cause injury for a relatively long period after the ordnance has been fired.”

The Commission found that these weapons were used in areas where “guidelines were unclear, operational discipline and orders were lacking, which led to cases in which there was deviation from specific command guidelines regarding the use of this type of munition, which was not identified and not halted during the extended duration of combat.”

The Commission also highlighted specific areas of dispute regarding the acceptability of cluster munition use and it recommended that such dispute be clarified unequivocally for the future. Such situations included the use of these weapons around civilian areas where unexploded submunitions could cause civilian casualties – including situations where the civilian population has fled but such casualties might occur on their return. Whilst suggesting that a broad acceptance of cluster munition use in such circumstances, based only on the judgment of a military commander in the field, would be at odds with the recognition that certain restrictions are necessary with respect to these weapons, the Commission did not go so far as to endorse a prohibition against their use in areas usually inhabited by civilians.

The Commission recommended that a re-examination of policy be conducted that include also parties outside the IDF and that the main findings from the re-examination should be made public.

The Hacohen Committee of the IDF

In November 2006, Israel’s Chief of Defence Staff, Lt. Gen. Dan Halutz reportedly ordered an internal investigation into the use of cluster munitions. Following widespread allegations of indiscriminate use of cluster munitions in violation of international law, the investigating committee was set up and headed by Major-General Gershon Hacohen to review the use of cluster munitions. Brigadier-General Michel Ben-Baruch, who headed the IDF’s first investigating committee, reportedly concluded that the “General
Staff’s orders, which were disseminated throughout the war and which referred to the use of cluster munitions, were not fully implemented.”

In August 2007 it was reported that the findings of this report were being considered for final approval by the Judge Advocate General of the IDF and the Chief of General Staff. On December 24, 2007, the army released the report, stating in part that:

Throughout the course of the war, rocket attacks on Israel’s civilians were carried out from areas of dense vegetation, in which the Hizbullah set up fortified infrastructure, (known as “Nature Reserves”), such that Hizbullah’s launching sites and rockets were heavily camouflaged, and therefore difficult to identify. Consequently, the IDF had to make use of weaponry which allowed for an immediate response to rocket fire while providing maximum coverage within the targeted area, such as cluster munitions, a weapon that conforms to international law.…

It was clear that that majority of the cluster munitions were fired at open and uninhabited areas, areas from which Hizbullah forces operated and in which no civilians were present. In cases where cluster munitions were fired at residential areas/neighborhoods, it was as an immediate defensive response to rocket attacks by Hizbullah from launching sites located within villages, which, prior to IDF attacks, had been evacuated by the vast majority of their local population, as a result of the numerous and constant warnings given by the IDF to the civilian population.

Was there a correlation between Israeli cluster strikes and Hezbollah rocket launches? According to one expert who was in South Lebanon during the bombing, this was perhaps the case earlier on in the bombing, but not in the last 72 hours of the war when the majority of cluster bombs were fired. Initially, if an Israeli drone saw where a Hezbollah rocket came from, an air strike was called in within a few minutes; if Israeli ground troops saw a launch, then ground troops fired cluster rockets or shells at the site. Hizbullah was firing rockets sometimes from villages, but mostly from outside or surrounding villages – orchards and wadis. The Israelis struck the same areas late in the war, but not in response to rocket launches.

Were cluster munitions the most effective weapon against Hezbollah rocket launches? As reported earlier in this chapter, a reserve officer in IDF artillery corps stated that artillery cannon and the Israeli air force were “more accurate and quicker.” A study of the Hezbollah rocket campaign conducted by the former director of the Israeli Missile Defense Organization in the Israeli Ministry of Defense found that:

Since Israel’s artillery lacks modern precision ammunition, it is reasonable to assume that its contribution to the suppression of the launchers could never have amounted to much.… It was the airborne component of the IAF – attack aircraft and UAVs – that carried the brunt of the battle to suppress the Hizbullah’s rocket fire.

The IDF investigation confirmed that commanders deviated from orders with respect to the use of cluster munitions, but excused these “deviations” nonetheless:

The [Military Advocate General (MAG)] also examined instances where commanders deviated from orders regarding the use of cluster munitions along with the circumstances which led to the deviations. In this regard, the MAG noted that during the war, the IDF was confronted with difficult combat, and that northern Israel was under constant and massive rocket and missile attacks, which resulted in approximately 4,000 rockets and missiles being fired at Israeli territory, all of which were deliberately intended to harm civilians and IDF soldiers. Under these circumstances, IDF forces used the resources in their possession in an effort to curtail the relentless rocket fire at Israeli civilians. These resources included cluster munitions – the most effective weapon with which the IDF could fight Hizbullah – while taking all feasible measures to minimize civilian casualties.

The MAG determined that even though these circumstances did not legitimize the deviations from the orders, these circumstances cannot be ignored when evaluating the deviations. Furthermore, the MAG also considered the fact that, even where there was a deviation from orders, the use of cluster munition fire was still in accordance with international law. Accordingly, the MAG decided not to take legal measures in response to the deviations.

The report does not detail what the disobeyed orders were nor why they were issued in the first place. Nor
does the report detail what precisely constituted the “taking of all feasible measures to minimize civilian casualties.” The report also states that:

Its use was a concrete military necessity. Thus, cluster munitions were fired exclusively at military targets, in accordance with the principle of distinction, and were used only when the officer in command determined that the potential damage to civilians and civilian infrastructure was not disproportionate to the military advantage gained from firing at the target.

The report conveniently makes no mention of the well known problem of unexploded ordnance associated with cluster munitions, nor whether that characteristic was taken into account when using the weapons. Critics of the IDF report noted the high failure rates. “Potential damage” with respect to cluster munitions must certainly include the immediate and long term damage created by unexploded ordnance. The types of weapons used by the Israelis, in particular the US manufactured artillery and air dropped systems, were well known prior to the conflict to create such lasting dangers. The humanitarian impact is great not only in urban areas, but in agricultural and grazing lands as well, as access to those areas is affected for days, months and years to come.

in reaction to the report, Amnon Vidan of Amnesty International in Israel stated that it would be better to have an international investigation as opposed to an internal one. He stated that certain facts point to different conclusions than those arrived at by the IDF, namely “[t]he amount of cluster bombs used in civilian areas, as well as testimonies by soldiers about the use of the bombs, and Israel’s refusal to hand over to the UN maps of the locations where it fired the bombs to help demining efforts”.

U.S. Arms Export Control Act

In August 2006 the U.S. State Department opened an inquiry into Israel’s use of U.S. cluster munitions during the conflict with Hezbollah. The grounds for such an inquiry were that certain U.S.-supplied cluster munitions were likely used in contravention of restrictions set down by the U.S. when these weapons were sold. The U.S. Department of State had reportedly already held up a shipment of M26 rockets containing M77 submunitions requested by Israel during the war. In January 2007, a U.S. State Department spokesperson stated that preliminary findings from this inquiry indicated that “there were likely violations” of the bilateral agreement under which these weapons were sold.

The State Department took these actions under the U.S. Arms Export Control Act (AECA). The AECA places conditions on the use of military equipment it sells or provides to foreign governments or international agencies, one of which being that weapons be used for “legitimate self-defence.” The term “legitimate self-defense” is undefined in the U.S. law and remains for the President or the Congress to decide based on the situation in question. Use of the phrase likely stems from a nod to the UN Charter, which in Article 51 states that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The International Court of Justice has considered what “self-defence” means, and has found it to be constrained by the requirements of proportionality and necessity:

The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (I.C.J. Reports 1986, p. 94, para. 176): “there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.” This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.

The AECA charges the U.S. president with promptly reporting to Congress if a “substantial violation” of the AECA may have occurred. If either the President (through a written report) or Congress (through a joint resolution) determines that a substantial violation of an agreement under the AECA has indeed occurred, the violating country cannot purchase any more military equipment from the U.S. This option has never been exercised with respect to any country.
The U.S. may exercise other options short of making such a finding that would require a total cessation of arms sales. Those options include halting arms exports in the pipeline or limiting the sales of particular weapons. In response to concerns about Israeli cluster bomb use in June and July 1982 in Lebanon, the U.S. Congress held hearings in July and August. On July 19, 1982, the Reagan administration halted sales of cluster bombs to Israel, a prohibition which lasted over six years.

Specific agreements may limit the use of defence articles even further under the AECA. Such agreements between the U.S. and Israel do exist, but are classified. Unidentified U.S. “officials” nevertheless told the New York Times that the agreements “specified that the cluster weapons could not be used in populated areas, in part because of the risk to civilians after a conflict is over if the bomblets fail to self-destruct, as they are designed to do.”

It was not until 29 January 2007, the State Department submitted a preliminary report to Congress concerning possible violations of the agreement. Sean McCormack, a spokesperson for the State Department, gave the following statement:

"Under the Arms Export Control Act there’s language in there that says that if a country has – likely has violated the terms of its agreements with the United States, then you – then that triggers a report to the Congress. Now, the question then becomes what kind of agreements are you talking about. Well, anytime throughout the licensing process of selling armaments and weapons to foreign countries, the United States typically will negotiate along with the licenses various end use agreements and in some cases agreements that specify under what kinds of conditions those armaments and munitions can be used... And it was the determination based on the facts that we in a preliminary finding – I have to emphasize preliminary, it’s not a final judgment – that there may likely could have been some violations of that agreement. So under the law, we are required to report that to the Congress and that is the step that we are taking today."

McCormack refused to discuss the terms of the agreements, claiming that portions of such agreements concerning rules of engagement were classified. When pressed as to whether the agreements prohibited the use of cluster munitions in civilian areas, or even prohibiting the use against civilians specifically, he would not answer directly.

He also would not comment on what kinds of actions could be taken against Israel, should the final report find that it had violated the agreements. He also could not say whether the U.S. had suspended sales of cluster munitions to Israel pending the outcome of the investigation. McCormack defended the right of Israel and the United States to have cluster munitions in their inventories and reiterated U.S. policy opposing the call for a freeze on the use of cluster munitions.

At the time, political analysts expected little if any additional action against Israel by Washington in light of overlapping and overarching strategic goals in the region. Subsequent inaction with respect to the AECA has proven them correct this far.

The transfer of cluster munitions from the U.S. to Israel in the 1970s was governed by a confidential letter of 1976 that applied restrictions on the circumstances when these specific weapons could be used. The existence of this letter was acknowledged after concerns were raised in Congress over civilian casualties from the use of cluster munitions in the 1978 and 1982 offensives in Lebanon.

In a 2005 report, Landmine Action suggested that this agreement can be seen as an acknowledgement by the U.S. that cluster munitions are a weapon of specific concern that required special restrictions. Israel’s 1978 and 1982 violations of the secret bilateral agreement governing use of U.S.-supplied cluster munitions demonstrated the inadequacy of such limited restrictions to ensure adequate protection for civilians in practice. The further widespread and indiscriminate use of cluster munitions by Israel in the 2006 conflict again underlines the failure of these limited restrictions to actually result in civilian protection.

A report by the Israeli newspaper, Haaretz, had earlier concluded that some 80 percent of the bomblets used had been made in the United States. In response to growing international concern regarding cluster munitions, the U.S. Senate included in its version of the Foreign Aid legislation for 2008 a clause that would place restrictions on the use of American military aid to purchase cluster bombs. The export moratoria legislation passed, restricting the sale of any U.S. cluster munitions during the fiscal year 2008 unless the weapons have a 99% or higher tested reliability rate.
Human Rights Council report

In addition to internal Israeli investigations and investigations by the U.S. Department of State, the UN Human Rights Council was asked to review allegations of war crimes, including the use of cluster munitions. In the report of three international law experts assigned by the Council, it was stated that the indiscriminate use of cluster bombs and deliberate attacks on civilian areas could qualify as war crimes and that Israel should prosecute those responsible.

A Council of Inquiry reported that during the conflict, including the last 72 hours, IDF cluster strikes were concentrated on three main areas of southern Lebanon. First, in the areas immediately to the east and south east of Tyre, a heavy populated area. Second, in the Tibnin area, a Hezbollah stronghold. Lastly, in the area north of the Litani River. The Council felt it found evidence that cluster bombs were used in an indiscriminate manner and that many towns and villages, as well as large tracts of agricultural land, were littered with the bomblets. In addition to Tibnin, Nabatiyeh, Yahmor, Ain Ibel, Yaroun, Bent J'beil, Qfar Tibnit and Swane were also considered deliberate targets of cluster bombings.

In November 2006, an Israeli newspaper reported that the Israel Defense Forces had discovered ‘irregularities’ in the use of cluster munitions, even before the end of the recent Lebanon war. Although the IDF admitted targeting populated areas with cluster munitions they also stated that this was only done after taking certain precautions. In a statement released by the IDF Spokesman’s Office, “the use of cluster munitions against built-up areas was done only against military targets where rocket launches against Israel were identified and after taking steps to warn the civilian population.”

The three-person UN inquiry commission said it found that:

“None of the weapons known to have been used by the IDF are illegal per se under IHL. However, the way in which the weapons were used in some cases...
transgresses the law. The Commission addressed more specifically the use of cluster munitions, 90% of which were fired by IDF during the last 72 hours of the conflict. The Commission finds that their use was excessive and not justified by any reason of military necessity. The Commission finds that these weapons were used deliberately to turn large areas of fertile agricultural land into ‘no go’ areas for the civilian population. Furthermore, in view of the foreseeable high dud rate, their use amounted to a de facto scattering of antipersonnel mines across wide tracts of Lebanese land. The presence of unexploded ordnance continues to act as a major impediment to the return of IDPs and refugees, as well as threatening the lives and livelihoods of those who have chosen to return.”

Moreover, members of the team concluded that the Israelis’ use of cluster munitions proves the weapons should be banned. “We saw the terrible, cruel consequences of the use of those weapons,” said Joao Clemente Baena Soares of Brazil. “We think they should be banned. They should be included in the list of weapons that are prohibited by international law.”

**CBU attacks on agricultural areas:**

*the longer term effects of duds and the proportionality/discrimination equation*

Where cluster munitions are used in rural areas they can reduce access to agricultural land resulting in impaired agricultural production. Figure 7 shows the location of one clearance task assigned to Mines Advisory Group in the area near Al Hosh, just a few kilometers southeast of Tyre. The cross-hatched circles represent “cluster bomb strikes” and the shaded area represents a “CBU Contamination Buffer” in which submunitions might be found, according to a map produced by the Mine Action Coordination Centre of South Lebanon (MACC SL). There were reports on the ground that Hezbollah had fired rockets from orange groves in the area. These reports echo claims by villagers throughout South...
Lebanon that Hezbollah, as a general rule, was firing rockets from outside of populated areas.

Even assuming the Hezbollah rocket launch sites from within orange groves were legitimate military targets, the unacceptably high dud rate from submunitions has had a foreseeable impact on the economic life and physical wellbeing of civilians.

Figure 8 “zooms in” on the site, showing the ongoing efforts in April 2007 to clear the submunitions from the orange groves. Mines Advisory Group clearance specialists had cleared 183 submunitions in an area equivalent to a football pitch, with a great deal of land left still to clear in the task.

Conclusions
As of early 2008, no Israeli or Lebanese citizen had been charged with any offences relating to the use of cluster munitions during the conflict. There appears to be a considerable lack of political will in Israel, Lebanon, and the United States to hold individuals, states or non-state actors accountable for the misuse of cluster munitions during the conflict.

Despite widespread international condemnation and clear assessments from various bodies that Israel’s use of cluster munitions in Lebanon in 2006 was in many cases in violation of international humanitarian law it is still not clear if any legal sanction will be applied. Hezbollah has also denied use of cluster munitions against civilian areas in the face of considerable evidence. These failures are good illustrations of the broader failure of international humanitarian law to protect civilian populations in relation to these weapons. It is because of such consistent and continued failures that a growing body of states now consider it necessary to establish prohibitions on the use of these weapons.
Chapter 5: Questioning the legitimacy of cluster munitions – a defence in criminal cases in the United Kingdom and the United States

“Therein lies the nub of it; the lawful excuse that allowed a jury to acquit having listened to a week of evidence on the consequences to Iraqis of ‘Shock and Awe’ and the indiscriminate nature of cluster munitions and depleted uranium.”

Toby Olditch and Philip Pritchard, 23 May 2007

Background

In 2006, there were three criminal cases in the United Kingdom in which civilians charged with criminal offences explicitly used the illegitimacy of cluster munitions as a defence. They involved break-ins to the Royal Air Force (RAF) base at Fairford in Gloucestershire with intent to disarm United States Air Force (USAF) aircraft the defendants believed would be used to commit war crimes in military operations against Iraq. In 2003 and 2004, juries in the U.S. state of Minnesota acquitted protestors charged with trespass at an arms manufacturer. This chapter briefly describes the conduct of several of these criminal cases, and the role that cluster munitions played in ensuring that only one of the three English cases resulted in a conviction and in acquittals also in several American cases.

The British overview focuses on the cases of Olditch and Pritchard and Milling and Jones. Although evidence on cluster munitions was prepared in support of the case of Josh Richards it was not presented in court. The American overview focuses most on the acquittals in December 2004.

The Crown v Milling and Jones

In early March 2003, a week before the “shock and awe” operation that launched the invasion of Iraq, Paul Milling and Margaret Jones broke in to RAF Fairford and used hammers and bolt cutters to try to disable two dozen bomb carriers and fuel trucks before they were arrested. It was claimed that the two activists, who were members of a group called Trident Ploughshares, caused £80,000 (U.S.$150,000) of damage trying to stop U.S. bombers taking off from Britain to attack Iraq.

Charges

Milling and Jones were charged with conspiracy to cause criminal damage under the 1971 Criminal Damage Act. If convicted, the defendants faced up to ten years in prison. Neither denied that they had committed the acts alleged by the prosecution. Indeed, upon arrest they handed over a statement they had prepared in which they wrote of the air base as “a launching pad for war crimes” and declared that if they could save one life by their actions, they would consider them justified. After a series of court rulings that went all the way up to the House of

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Lords, it was accepted by the English judicial system that a jury could be asked by the defence to acquit defendants charged with damaging military property because they were trying to prevent war crimes.\textsuperscript{134}

Their trial by jury began at Bristol Crown Court on 4 September 2006 – more than three years after the alleged offences took place – and was presided over by the Recorder of Bristol, Judge Thomas Crowther QC.

\textbf{Defence}

The two defendants both pleaded not guilty on the basis that Section 3 of the Criminal Law Act provides a defence where the alleged offence was committed in the process of preventing a crime. Initially, they had tried to argue that the war against Iraq constituted a crime of aggression under international law. However, after the issue went to the House of Lords, the law lords ruled in March 2006 that waging an unlawful war is not a crime under domestic law.\textsuperscript{137} The Lords' ruling, however, did not stop Jones and Milling from arguing that they were acting to prevent specific war crimes in Iraq. Such war crimes could include attacking or bombing civilian objects, or the use of unlawful weapons.

Accordingly, the defendants chose to rely on two statutory defences against the charges: Section 5 of the 1971 Criminal Damage Act, which provides lawful excuse for damaging property if that action prevents property belonging to other people from being damaged, and Section 3 of the 1967 Criminal Law Act, which states that “a person may use such force as is reasonable in the prevention of a crime”.

Since the acts that formed the basis of the criminal charges were not in dispute, evidence centred on their possible justification. On 6 September, Dave Cockcroft, a longstanding peace campaigner and local Green Party member was called as a witness for the defence. Dave Cockcroft, who became a Stroud Town councillor in August 2006, provided evidence of cluster bombs being loaded onto B-52 aircraft at Fairford during the bombing of Iraq in 2003. The day before giving evidence, he stated: “I can remember feeling sick when I saw that cluster bombs were being used. These weapons are commonly referred to as ‘drop today and kill tomorrow’. As reported in Lebanon just last week, the use of cluster bombs leaves unexploded bomblets scattered around waiting to tear apart anyone who encounters them. They really should be banned, just like land mines.” He added, “I hope the trial gives a little more coverage to the continued use of these dreadful weapons and brings nearer the day when they’re banned.”\textsuperscript{138} Later that week, the court heard testimony from those who were in Baghdad during the bombing, including a young Iraqi man who survived the cluster bombing of a residential area.\textsuperscript{139} Rae McGrath, the founding Director of the Mines Advisory Group, which has carried out humanitarian clearance of explosive remnants of war in many countries, spoke at length about cluster bombs, and the injuries and death they cause. He also identified what could be seen in Dave Cockcroft’s photographs taken at RAF Fairford in the days before the war, and confirmed that cluster munitions were indeed loaded onto the B-52 bombers.\textsuperscript{140}

\begin{center}
\textbf{BOX 2. A DEFENCE TO A CHARGE OF CRIMINAL DAMAGE UNDER THE 1971 CRIMINAL DAMAGE ACT}
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Section 5 of the Criminal Damage Act 1971 provides that:

“A person charged... shall be treated for those purposes as having a lawful excuse if he damaged or threatened to damage the property in question in order to protect property belonging to himself or another... and at the time of the act or acts alleged to constitute the offence he believed

(i) that the property... was in immediate need of protection; and

(ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.”
In closing the prosecution’s case, Bruce Houlder alleged the defendants “claimed a charter” to act without reference to the law. If the defendants’ actions were taken to their logical conclusions, he told the jury, “one might as well tear up the laws of this country.” But according to Hugo Charlton, the barrister defending Margaret Jones, this was “a unique case”. The law allowed for exceptional circumstances, and the threat to life in Iraq posed by the bombers at Fairford was one such situation. The burden of proof, he said, was “on the prosecution”. It was not necessary for the defendants to have been engaged in actually “stopping” a crime. It was enough that they were seeking to prevent it, and that they honestly believed that homes and property in Baghdad were in need of protection.

In summing up, the judge told the jurors that using weapons “with an adverse effect on civilian populations which is disproportionate to the need to achieve the military objective” is a crime.

Outcome

Following the jury’s direction by Bristol’s Recorder on 13 September they retired to consider their verdict. The following day, the jury sought clarification from the judge on whether ‘delaying’ the commission of a [war] crime could be regarded as equivalent to preventing it. The judge confirmed that it could. But despite many hours of deliberations, the jury failed to agree on a verdict and were discharged by the judge on 15 September 2006.

The defendants were put on trial again in July 2007 and convicted of conspiracy to commit criminal damage. The prosecution, while accepting the pair acted on their “honestly held beliefs”, insisted they were still guilty of breaking the law.

The Crown v Olditch and Pritchard

On 18 March 2003, two days before the attack on Iraq began, Toby Olditch and Philip Pritchard (the “B-52 Two”) broke into the Fairford base equipped with tools and paint, intending to disarm USAF planes. They were caught by guards before they had the chance to inflict any damage on any aircraft and subsequently arrested and taken to Stroud police station for questioning.

Charges

Olditch and Pritchard were similarly charged with conspiracy to commit criminal damage under the 1971 Criminal Damage Act. Again, the maximum sentence they could receive in the event of a successful conviction was ten years’ imprisonment.

In his testimony, which began on the second day of the trial, Olditch stated his belief that specific war crimes would be committed in the event of a war against Iraq. His fears in this regard centred on the use of cluster bombs and weapons containing depleted uranium, and the disproportionate harm civilians would suffer from them. In his own words, “I imagined Dresden happening in Baghdad.”

On the third day of the trial, Rae McGrath again testified on behalf of the defence as to the effects of the weapons. McGrath was not cross-examined by the prosecution and his claims as to the humanitarian impact of the weapons were not contested.

Philip Pritchard took the stand on the fourth day of the trial. He confirmed that his principal aim in trying to damage bombers at Fairford was to try to stop cluster weapons and bombs containing depleted uranium from being dropped on Iraqi civilians. Pritchard also declared his hope that damaging bombers and perhaps causing the base to be closed might cause sufficient delay that the ‘weather window’, during which the war could begin, would pass, allowing more time for a diplomatic solution to the conflict.
On day six of the trial, the judge began his summing-up. He reminded the jury that the defences offered by the accused were twofold: 1) that Olditch and Pritchard were acting to protect property in accordance with Section 5 of the Criminal Damage Act 1971, and 2) that the use of force is allowed in law to prevent a crime, as laid down in Section 3 of the Criminal Law Act 1967. If the prosecution failed to disprove either defence beyond reasonable doubt, then the defendants would have to be acquitted.

In the jury’s Steps to Verdict guidelines about that defence, that of acting to protect property, there were three questions. If the jurors decided that the answer to each of these questions was yes, then the defendants had a lawful excuse for their actions and must be found not guilty. The questions were:

i) Did they agree that they would act to protect another’s property from damage?

ii) Did they believe that at the time they were to act, property would be in immediate need of protection, i.e. on 18 March 2003, did they believe they had to act right then if protection was required?

iii) Did they believe that the means of protection they agreed on would be reasonable having regard to all the circumstances as they understood them.

If the answer to any of these three questions was no then the defence of lawful excuse of acting in protection of property did not apply, and the jury were to go on to consider the second defence, that of acting to prevent a crime.

With regard to Section 3 of the Criminal Law Act 1967, the jury had to determine whether the actions the defendants agreed upon were done so as to prevent a war crime, and in those circumstances were they reasonable? The judge declared that, for the purposes of the trial, the jury should regard as a war crime “the use, to achieve a military purpose, of weapons with an adverse effect on civilian populations which is disproportionate to the need to achieve the military objective.” But the jury did not need to decide whether war crimes were, in fact, committed. What they had to consider was whether the Olditch and Pritchard believed that war crimes would be committed, which the prosecution had accepted they did.

In order for this defence to apply the answer to the following two points had to be yes:

i) that what the defendants agreed to do was to do only such damage as was necessary to prevent the crime they believed was about to be committed; and

ii) that such damage as they agreed to commit was reasonable. The definition of reasonableness was not whether the defendants believed the damage would be reasonable but whether, in the light of the circumstances as they believed them to be, the damage was objectively reasonable.

Following the summing-up, the jury retired to consider their verdict. The following morning – on the seventh day of the trial – the jury asked the judge whether the definition of property included infrastructure used jointly by civilians and the military. He answered that it did.

Outcome

After two days of deliberations, the jury reconvened on 11 October 2006 to inform the judge that they had been unable to reach a verdict. The judge thanked the jury for their efforts and then discharged them. The prosecution stated that they would be seeking a retrial. The defendants were released on bail and under instructions not to approach Fairford air base.

The date for the retrial was set for 14 May 2007, again in Bristol. On 22 May 2007, Olditch and Pritchard were both acquitted by the jury. Outside the court-room, Toby Olditch, declared that: “The worst-case scenario for us would have been prison, but nothing compares to the horror that has been inflicted on ordinary Iraqis.”

### BOX 3. A DEFENCE TO A CHARGE OF CRIMINAL DAMAGE UNDER THE 1967 CRIMINAL LAW ACT

Section 3 of the 1967 Criminal Law Act provides that: “A person may use such force as is reasonable in the prevention of a crime”.

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The Alliant Techsystems Protests,
Edina, Minnesota

For over ten years protestors have been a weekly presence at the headquarters of Alliant Techsystems for over ten years, a weapons manufacturer in Edina, Minnesota. As of January 2006, local authorities had made 176 arrests for nonviolent trespass. Protestors won three jury trials in 2003 and 2004. Eight protestors went to trial on December 10 and 14, 2004 (four on each day), and were acquitted by the juries. In the summer of 2004, police in Edina, Minnesota had arrested the protestors for criminal trespass on the grounds of arms manufacturer Alliant Techsystems while the protestors were attempting to deliver information about international law and cluster bombs, landmines and depleted uranium weapons. One of the protestors, Steve Clemens, described the trial as follows:

The trial, presided over by Judge Regina M. Chu, focused on a provision in the MN trespass law which provides for “a claim of right”. The defendants successfully argued that it was reasonable for them to be on the property of this weapons manufacturer because of treaties signed by the United States.

Quoting Article VI of the U.S. Constitution where international Treaties signed by our government are identified as “the supreme law of the land”, the defendants then offered into evidence excerpts from the Hague and Geneva Conventions, the CCW Treaty, and the Nuremberg Principles. The Judge also permitted inclusion of articles the defendants had read prior to their nonviolent action that influenced their intent that day.

Under Minnesota law, “a person is guilty of a misdemeanor if the person intentionally... trespasses on the premises of another and, without claim of right, refuses to depart from the premises on demand of the lawful possessor.”

In 2005, the Edina city council had modified the local trespass ordinance, reducing it from a misdemeanor to a petty misdemeanor. By doing so, the right to a jury trial was removed, as was the “claim of right” defense. City officials claimed the change was to reduce costs. Protestors ironically saw it as an effort to reduce their “opportunity to add to the public record that a jury trial provides.” In July 2005, 12 protestors were found guilty in front of a judge. One protestor appealed, arguing the new city ordinance was pre-empted by state trespassing laws. In an unpublished decision, the court of appeals upheld the city ordinance.

Impact of these actions: jury verdicts, The Martens Clause and the dictates of public conscience

For the first time in an English court, the belief that cluster bombs would be used to commit war crimes was effectively used as part of a defence in a criminal trial. The prosecution in the three cases did not contest the humanitarian impact of the weapons.

Between the trials and retrials in the English cases, only one jury out of six returned a guilty verdict. This is despite none of the defendants denying the facts forming the basis of the charges.

What do these cases signify beyond the immediate verdicts for the defendants? The most immediate application would be that protestors see these arguments as justification for actions taken to oppose the use of arguably illegitimate weapons.
Over the longer term, the not guilty verdicts might be seen as evidence of what constitutes “the dictates of public conscience” under the Martens Clause. The clause, drafted by the Russian jurist F. F. de Martens, formed part of the preambles to the 1899 and 1907 Hague Conventions on the Laws and Customs of War on Land. The formulation from the 1907 Convention reads as follows:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.162

Slightly differing formulations of the Martens Clause have been incorporated into numerous international treaties since then, including the 1949 Geneva Conventions, the 1977 Additional Protocols to the Geneva Conventions, and the 1980 Convention on Conventional Weapons (CCW). The 1997 Ottawa Antipersonnel Mine Ban treaty stresses in its preamble “the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines.”163

How does one determine what the dictates of public conscience are? According to one leading jurist:

Dictates of public conscience... can be seen as public opinion that shapes the conduct of the parties to a conflict and promotes the development of international humanitarian law, including customary law... Although weapons or means of warfare are seldom prohibited on the sole basis of their incompatibility with such general principles as those of humanity or the dictates of public conscience, a sense of abhorrence of a particular weapon can be an important factor in the development of treaty prohibitions... [T]he Martens clause does not allow one to build castles of sand. Except in extreme cases, its references to principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war, especially in contested cases.164

What constitutes useful public opinion is open to debate. But a strong case can be made that jury verdicts in duly constituted domestic courts of law can form part of the public conscience with respect to particular weapons systems. Unlike the protestors themselves who are on trial, the juries are not self selecting members but are drawn from a representative cross section of the adult population of a community.
Chapter 6: The 1995 shelling of Zagreb – the case of Milan Martić before the International Criminal Tribunal for the former Yugoslavia

“As a counter-measure to what Tudjman did to you here, we have shelled all their cities, Sisak several times, and Karlovac, and Zagreb yesterday and today. This was done for your sake... Today, an ultimatum follows. If they continued to attack our besieged forces, we will continue to attack Zagreb and destroy their cities. Then they begged us to stop shelling Zagreb and said that they let our people out of the encirclement, which is what interests you most.”

Milan Martić, 3 May 1995

Introduction

On 14 June 2007, the International Criminal Tribunal for the Former Yugoslavia convicted the former president of the self-proclaimed Republic of Serbian Krajina, Milan Martić, of war crimes and crimes against humanity. Among the consequences for which he was held responsible were the deaths and injuries from rocket attacks on Zagreb on 2 and 3 May 1995. The rockets were equipped with cluster munition warheads.

Background

Amid the bloody break-up of the Socialist Federal Republic of Yugoslavia in the early 1990s, war erupted in the newly independent state of the Republic of Croatia in the summer of 1991. The armed forces of Croatia (HV) were engaged in an armed conflict with the armed forces of the self-proclaimed “Serbian Autonomous District (SAO) Krajina”, later re-named “Republic of Serbian Krajina” (RSK). The RSK, with the assistance of the Yugoslav Peoples’ Army (JNA), defeated the HV in numerous battles taking control of approximately one-third of the territory of Croatia, including parts of East and West Slavonia, and the Krajina.

From 4 January 1991 until August 1995, Milan Martić held various leadership positions within the so-called (SAO) Krajina/RSK, rising eventually to the presidency of the breakaway republic in February 1994. According to the International Criminal Tribunal for the former Yugoslavia prosecutor’s final brief against Martić, he held the “greatest power of any person in the Krajina, and he used that power to further the goal of a separate Serb state through all means necessary, including war crimes and crimes against humanity against Croat civilians.”

On 1 May 1995, the HV attacked the RSK forces in Western Slavonia, in what is commonly referred to as ‘Operation Flash’, and drove the RSK forces south across the Sava River into the Serbian-held part of Bosnia. According to the initial indictment against Martić, it was alleged that in retaliation he ordered the RSK’s military forces to attack three Croatian cities, including Zagreb, the Croatian capital.

On 2 May 1995, at approximately 10.25am, Orkan rockets fitted with cluster-munition warheads were fired into the central part of Zagreb by RSK forces, killing four civilians and wounding more than 100 others.

On 3 May 1995, at approximately 12.10pm, the RSK fired further Orkan rockets with cluster-munition warheads into the central part of Zagreb, again causing death and injury to civilians in Zagreb. In total, at least seven civilians were killed and a further 196 were injured in the two days of attacks.
BOX 4. THE CASE OF SANJA BUNTIC, A STUDENT AT THE TIME OF THE MAY 1995 ATTACKS*

It was a very nice, sunny day. I was on my way to the faculty, and I was a bit earlier than normally. And I reached the Ban Jelacic Square, which is the very centre of Zagreb, and I decided to take a walk to the central railway station, and then from there to take a tram. However, I never reached the central railway station because it was about 10.00 in the morning when I heard the sound of a shell, and I instinctively threw myself on the ground and felt a sharp pain in my head and in the area of my stomach.

In my immediate vicinity, a car blasted. There was smoke and dust around me. I heard in the background women and children screaming. There was panic all around. This happened all of a sudden.

At last an ambulance arrived where there were two people already, young people, a boy and a girl. The boy was severely wounded to his lungs, and the girl wasn’t that badly wounded, but we were all feeling quite ill. Finally we reached a hospital in the centre of town, but they had no capacity to receive us because there were already many people there. They kindly asked us to proceed to another hospital that was close to that one. As we reached the other hospital the situation was the same; they were sorry, but there was nothing they could do.

So we proceeded to a third hospital, where we were finally admitted, although there were many people there. They didn’t have beds enough for us, so they placed sheets on mattresses on the floor. We had to lie down, undress, they asked us some of the basics. After these preliminary questions they X-rayed us and then we went into surgery. This perhaps lasted a couple of hours, and I woke up in intensive care.

I was first released from intensive care to another ward of the same hospital, where they were trying to drain the water from my lungs, which were unsuccessful, and then they performed several surgical procedures intended to drain my lungs of water. And as they were unsuccessful, they decided that I needed to be treated by a specialist [in another hospital]. At the other hospital my lungs and my stomach were X-rayed. I was then operated on, with a view to draining liquid from my lungs.

Several days later when it showed that the operation was successful, they stitched up my wound in the lower left leg caused by a piece of shrapnel. Although the shrapnel came close to the bone, the bone wasn’t shattered and they told me I was lucky, in fact, because – I was lucky not to lose my leg. I had several pieces of shrapnel in my head as well which hadn’t really damaged any of the centres in the brain, and I was lucky there, too.

The worst hit was my liver, in fact. There were quite a few pieces of shrapnel there, and the ones they were able to extract they did and they stitched me up. As for other pieces of shrapnel, they – the operation threatened to damage more tissue by trying to extract the pieces of shrapnel than by just leaving them there.

* Martić Case, Trial Records, pp. 5761, 5762–5763, 5765–5767, and 5768.

BOX 5. THE CASE OF SANJA RISOVIC, ZAGREB, 3 MAY 1995*

We arrived at the children’s hospital some 15 [minutes] ahead of the scheduled meeting, which was at 10.30. My brother was there to help me because he was very, very concerned about my daughter. He thought she was so small, a four-month-old child. I asked him to go over to the [doctor’s] office itself to see whether the lady who was inside was finished or not so that I could go over... with my daughter... At the moment he was about to move and I was lifting Anamaria, Anamaria is my daughter’s name, as I lifted her in my arms, I heard a blast. I heard the window-panes getting smashed.

As I was holding the child in my arms, I went forward. There was a table blocking my way. I pushed it aside and I maybe made one step only. At that point I felt as if someone had hit me on my back. I don’t know how to explain this. As if someone had taken a chair and hit me with it. I had the child in my arms and I was bending over. I was hunched a bit. I can’t really say how long this lasted. I didn’t have the feeling of the time. I was standing there with my child, and next to me there was a man. I don’t even recall his face. I just told him: Please, take my child. I think everybody must have been in shock because nobody reacted to what I said, and I was unable to move at all. I wasn’t able to move my right leg...

(Continued on page 35)
The initial indictment

The International Criminal Tribunal for the former Yugoslavia (ICTY) was set up under a mandate from the United Nations Security Council in May 1993 to judge alleged violations of international humanitarian law occurring on the territory of the former Yugoslavia since 1991. The initial indictment against Martić was issued by the ICTY on 25 July 1995, less than three months after the bombardment of Zagreb. It accused Martić of ordering or, alternatively, failing to prevent, the use of cluster bombs against civilians in Zagreb on 2 and 3 May 1995 in violation of the laws and customs of war (see Box 6 overleaf for the full indictment).

Rule 61 hearing

In a small number of instances, including the Martić case, where the Tribunal was unable to obtain custody of an accused, it proceeded under Rule 61 of its Rules of Procedure and Evidence. In such proceedings a full Trial Chamber examines an indictment and the supporting evidence in public and, if it determines that there are reasonable grounds for believing that the accused committed any or all of the crimes charged, confirms the indictment and issues an international arrest warrant. A Rule 61 hearing is not a trial in absentia and does not provide for a finding of guilt. Based on evidence and testimony received on 27 February 1996, the Trial Chamber issued a decision on 8 March 1996 confirming the initial indictment and issuing an international arrest warrant for Martić which was sent to all States and to the NATO-led Implementation Force that was in Bosnia and Herzegovina at the time.

The expert testimony at the Rule 61 hearing focused on the nature of the Orkan rocket used in the attacks. In its

Figure 11.
The aftermath of the cluster munition attacks on Zagreb in May 1995

Indictment by the ICTY and the case against Milan Martić

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Rule 61 Decision, the Trail Chamber considered that the use of a cluster bomb warhead constituted evidence of the intent of the accused to deliberately attack the civilian population.\(^{174}\)

The effects of these rockets have been known for many years... The military expert believed that because they are inaccurate and have a low striking force, the choice of the Orkan rockets for the attack on Zagreb would not have been appropriate had the purpose been to damage military targets... In respect of its accuracy and striking force, the use of the Orkan rocket in this case was not designed to hit military targets but to terrorise the civilians of Zagreb. These attacks are therefore contrary to the rules of customary and conventional international law.\(^{175}\)

Because the Trial Chamber found that the evidence supported an indictment for intentionally targeting civilians, the ICTY prosecutor would later use this rationale to distinguish the Martić case from the NATO cluster bombing of Niš in Serbia during the 1999 NATO bombing campaign (see Chapter 3). As the final Martić judgment in 2007 was to make very clear, the use of the Orkan cluster bombs even against military targets in urban areas can be found to be unacceptable.

The expert testimony also established that the bomblets in the Zagreb attack failed to explode on contact at a very high rate.\(^{174}\)

### The amended indictments

As the case against Martić grew, an amended indictment was issued on 18 December 2002, which was subsequently confirmed by the Trial Chamber.\(^{177}\) It broadened the scope of the indictment considerably beyond the original charges, although the killing of civilians in Zagreb by cluster munitions at the beginning of May 1995 remained a critical element, and the details of the alleged crimes were expanded upon.

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**BOX 6. THE ICTY’S INITIAL INDICTMENT AGAINST MILAN MARTIĆ\(^{178}\)**

**Count I (for 2 May 1995) and Count III (for 3 May 1995)**

On 2 May 1995, MILAN MARTIĆ, as president of the self-proclaimed RSK, knowingly and wilfully ordered an unlawful attack against the civilian population and individual civilians of Zagreb causing at least seven deaths (at least five on 2 May and at least two on 3 May) and numerous injuries to the civilian population and individual civilians of Zagreb, and in doing so, MILAN MARTIĆ violated the laws and customs governing the conduct of war, a crime recognised by Articles 3 and 7(1) of the Tribunal Statute; or alternatively,

**Count II (for 2 May 1995) and Count IV (for 3 May 1995)**

On 2 May and 3 May 1995, MILAN MARTIĆ, as president of the self-proclaimed RSK, knew or had reason to know that a subordinate in the ARSK was about to commit and did commit a war crime, that is, the unlawful rocket attack against the civilian population and individual civilians of Zagreb, and MILAN MARTIĆ failed to take the necessary and reasonable measures to prevent the attack and failed to punish the perpetrators of the attack, all in violation of Articles 3 and 7(3) of the Tribunal Statute.

NB: Article 3 of the Tribunal statute specifies that violating the laws or customs of war constitute war crimes. Article 7(1) allows for individual criminal responsibility for acts of state: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.” Article 7(3) addresses command responsibility, as the commission of war crimes or crimes against humanity by a subordinate “does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” Article 5 states that certain acts, including murder and other inhumane acts, when committed in armed conflict and directed against any civilian population, constitute crimes against humanity.\(^{179}\)
Charges were laid of a joint criminal enterprise, which included the planning and ordering of the shelling attacks on Zagreb in May 1995. In addition, Counts 15–19 of the amended indictment dealt with the attacks on Zagreb as “unlawful attacks on civilians, murder, inhumane acts and cruel treatment” constituting violations of the laws and customs of war and crimes against humanity.

The amended indictment marked a subtle but important shift. The factual allegations left open the possibility that Martiћ and his subordinates had attempted to use the weapons against military objectives but had done so illegally (rather than intentionally targeting civilians).

The surrender of Milan Martiћ to the ICTY and the progress of the trial

On 15 May 2002, Martiћ voluntarily surrendered himself to the authorities in The Netherlands and was transferred to the ICTY the same day. On 21 May 2002, he pleaded not guilty to all the charges laid before him. The trial of Martiћ began on 13 December 2005 with the Prosecution completing its case-in-chief on 20 June 2006. The Defence began presenting its case on 11 July 2006.

On 25 September 2006, the Trial Chamber sitting in the case began a site visit to several locations in Croatia; this included visits to the areas of Zagreb hit during the cluster munition attacks of 2 and 3 May 1995. On 10 January 2007, the Prosecution delivered its closing arguments to the trial judges. The Defence closed the following day and on 12 January, there were rebuttal arguments by both. The verdict was delivered on 12 June 2007.

The evidence against Martiћ relating to the use of cluster munitions

According to the initial indictment in 1996 against Martiћ, the Orkan rocket is “a long range weapon [that] can be fitted with different warheads to accomplish distinct tasks: either to destroy military targets or to kill people. When the Orkan (see Figure 12 overleaf) is fitted with a ‘cluster bomb’, such as used against Zagreb, it is an anti-personnel weapon designed only to kill people [sic].” According to reports during the trial its proper military use would be to provide fire support to corps-sized and army-sized units, by neutralising “all types of targets, from troops to armoured combat vehicles, and provide anti-armour barrage fire.”

When used with a cluster warhead, a single Orkan rocket contains 288 shaped-charge and fragmentation bomblets (see Figure 13 overleaf), each containing 420 pellets of 3 millimetres diameter. The bomblets are ejected from the rocket by a pyrotechnic charge at a height of 800 to 1,000 metres. As it falls, a bomblet is stabilised by a textile band, which also arms a mechanical fuze that should detonate upon contact...
with the ground. The 288 bomblets are dispersed over an area of about two hectares (20,000 square metres) and the lethal range of each pellet is about ten metres.\textsuperscript{188} This elliptical dispersion area is sometimes referred to as a “footprint.” A footprint the size of 20,000 square meters would be an ellipse of approximately 150m x 200m.

According to expert testimony, the maximum firing range of the Orkan when fitted with cluster warheads is just over 50 kilometres.\textsuperscript{189} But the further away from the target, the greater the risk of error in targeting. It was calculated that a launch from 49 kilometres away could result in the bomblets actually landing up to one kilometre away from the intended point of impact.\textsuperscript{190} The area in which a rocket may fall with respect to this possibility is often referred to as an “error ellipse” or a “circular error probable.”

Lieutenant-Colonel Jozef Poje of the Slovenian armed forces, an expert witness for the prosecution with particular knowledge of artillery, stated that: “In view of the fact that it has high dispersion capabilities, Orkan is not principally suitable for use in populated areas. It is designed for use outside populated areas. The reason for this is primarily that its effects in populated areas, regardless of the fact that there might be military targets in populated areas, there is a high probability that parts of the rocket should be dispersed and affect the civilian population, especially when the civilian population has not been evacuated on time or has not taken refuge or shelter. So I would like to mention once again Orkan is not intended for deployment in populated areas.”\textsuperscript{191}

The defence tried to establish that the Orkan cluster munition warheads were a legitimate weapon that was being used to target lawful military objectives in Zagreb. In his closing statement, the Prosecutor declared that: “The evidence further establishes that Mr. Martić targeted Zagreb because it would have a maximum impact by causing maximum terror on the Croat side. He was not targeting military targets in Zagreb. That is obvious by his statements, statements of Mr. Celeketic [the commander of the RSK armed forces], as well as by the simple fact that the Orkan rockets would not reasonably possibly be expected to cause significant damages to places like the Ministry of Defence, and certainly could not be expected that hitting such places with an Orkan rocket would have any effect whatsoever on Operation Flash. That is simple fantasy... But hitting Zagreb, the city, with all of its civilian inhabitants, now that could have an impact, or at least he thought.”\textsuperscript{192}

Figure 14 uses the trial testimony about alleged military targets (presidential palace, the ministries of defence and interior, and the airport), the strike points of the cluster rockets, and the reported characteristics of the Orkan (footprint size and error ellipse). It indicates that eight of the strikes actually fell within the predicted error ellipses around the alleged targets, but did not hit the alleged targets. A children’s hospital, public squares, the national theatre, an old folks home, and a high school were among the civilian objects hit in the attacks.\textsuperscript{193} Even when performing as expected, the munitions are inappropriate for use in populated areas. Several strikes hit far from alleged targets as well.

The Trial Chamber also rejected, without comment, an argument by the defence that had the RSK forces been prohibited from using cluster munitions against
Figure 14. Estimated locations of cluster bomb footprints and error ellipses in 1995 Zagreb attack in relation to alleged military targets. © Jim Moen and Virgil Wiebe
the military targets in Zagreb, it would have been forced to use equally inaccurate but more destructive rockets tipped with large unitary warheads.\textsuperscript{194}

In his closing statement, the Prosecutor defended his call for a sentence of life imprisonment should the accused be convicted. He asked the judges to “Think about Zagreb in May – on May 2nd and May 3rd of 1995, beautiful spring/summer day. The seven people who were killed in those attacks, the hundreds who were injured, and no doubt the thousands who were terrified when the shells rained down on Zagreb on May 2nd and May 3rd.”\textsuperscript{195}

The judgment

On 12 June 2007, the Tribunal issued its judgment, finding the defendant guilty of war crimes and crimes against humanity, including for the use of cluster munitions against Zagreb. He was sentenced to 35 years’ imprisonment.

The summary judgment of the court read in part as follows [emphasis added]:

The Trial Chamber will now focus on the M-87 Orkan. This weapon is a multi-barrelled rocket launcher, which launches non-guided rockets. The primary use of the M-87 Orkan is to target soldiers and armoured vehicles. The evidence shows that each rocket launched on Zagreb on the 2nd and 3rd of May 1995 contained a cluster warhead loaded with 288 so-called bomblets. These bomblets are ejected at a height of 1,000m above the targeted area. Upon impact, each bomblet explodes and releases 420 steel pellets. The lethal range of each pellet is ten metres. This means that each rocket releases around 120,000 pellets.

The maximum firing range is 50 kilometres and at this distance the weapon displays a targeting error of one kilometre in any direction.

The evidence shows that on the 2nd and the 3rd of May 1995 the M-87 Orkan was fired from the Vojnić area, near Slavsko Polje which is at the extreme of the weapon’s range. The evidence shows that by virtue of its characteristics and the firing range in this specific instance, the M-87 Orkan was incapable of hitting specific targets. For these reasons, the Trial Chamber has found that the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of severe casualties.

The Defence has argued that there were military targets in Zagreb at the time of the attacks on the 2nd and the 3rd of May 1995, including the Ministry of Interior, Ministry of Defence, Zagreb airport, and the Presidential Palace. In view of the characteristics of the M-87 Orkan, the Trial Chamber has found that the presence or otherwise of military targets in Zagreb is irrelevant. The Defence’s argument has therefore been dismissed.

By 2 May 1995, the effects of firing the M-87 Orkan on Zagreb were known to those involved. Moreover, before the decision was made to once again use this weapon on Zagreb on the 3 May 1995, the full impact of using such an indiscriminate weapon was known beyond doubt as a result of the extensive media coverage on the 2 May 1995 of the effects of the attack on Zagreb.

The Defence advances the argument that the attacks on Zagreb were lawful reprisals under customary international law. It argues that the attacks were carried out with the aim of putting an end to violations of international humanitarian law committed by “the Croatian military and police forces” particularly during Operation Flash. The Defence submits that this operation was a breach of the cease-fire agreement and conducted without respect for the norms of international humanitarian law.\textsuperscript{196}

The Trial Chamber also held Martič criminally liable for death and injury caused by unexploded submunitions. On 3 May, Police Officer Ivan Markulin died while trying to defuse a bomblet in the yard of the children’s hospital.\textsuperscript{197} The ICTY convicted Milan Martić for Markulin’s murder.\textsuperscript{198} Police Officer Ivica Pukšec suffered severe injuries on 3 May while defusing a bomblet. His left arm was amputated.\textsuperscript{199} Pukšec was included among those for whom Martić was held criminally liable for inhumane acts and cruel treatment.\textsuperscript{200}

The expert testimony from military analysts at the Rule 61 hearing in 1996 established that the bomblets in the Zagreb attack failed to explode on contact at an astonishing rate. The Zagreb Anti-Explosives Department
retrieved about 1599 unexploded bomblets in the days and weeks following the attacks. The duds were either armed (and failed to explode because they hit at an angle) or were not armed at all as a result of the rocket opening too late in flight. Depending on whether eight or twelve rockets fell (each carrying 288 bomblets), the overall failure rate was between 46% and 69%.

While the Trial Chamber should be commended for holding Martić accountable for death and injury caused by unexploded submunitions in the immediate aftermath of the attack, it missed the opportunity to hold Martić liable for the foreseeable injuries caused later by unexploded submunitions. At the Rule 61 hearing, the prosecution presented evidence about severe injuries to four children injured by a submunition in July 1995, several months after the attack. The prosecution did not later include these children in their victims list in amended complaints.

**Lessons to be learned**

The Martić case yields several lessons. First, it demonstrates that advance awareness of cluster weapon characteristics can lead to criminal liability. Martić and his military advisers knew about the immediate effects of the Orkan rockets on a densely populated civilians area (in particular their wide area effects and the large circular error probable when fired at the outer limits of their range). The use of such unguided cluster munitions with wide area effects may lead to criminal liability. Second, cluster munition use against military targets in civilian areas should be presumptively off-limits in light of those characteristics. Third, the Trial Chamber also indirectly addressed a counter argument often made by proponents of “responsible” use of cluster munitions, namely that barring their use will lead to greater use of unitary warheads in civilian areas. The Trial Chamber rejected that defence argument, leading to the conclusion that restricting cluster munition use should not be seen as a green light to use even more destructive weapons indiscriminately. Finally, while the Trial Chamber could have more explicitly addressed the issue of unexploded ordnance, the judgment nevertheless makes clear that duds do matter. In particular, users of cluster munitions can be held accountable for the probable harm caused by unexploded ordnance in the immediate aftermath of a cluster munitions attack.
Notes


2. For a summary, see Ibid.


8. Ibid., Art. 51(5).


10. See Failure to Protect, op. cit.


13. Failure to Protect, op. cit., p. 12.


16. Ibid., Article 3 (1).

17. Ibid., Technical Annex. It is specified that the implementation by States Parties is on a voluntary basis only. Ibid.

18. Ibid., Article 3 (a) (i) and (e), Technical Annex.


25. Ibid., para. 101.

26. Ibid., para. 9.

27. Ibid., para. 101.
28 Ibid., para. 103.
29 Ibid., para 105.
30 Ibid., para 106.
31 Ibid.
32 Ibid., para. 107.
33 Ibid., para. 108.
34 Ibid., para. 111.
35 Ibid., para. 108. The Eritrean Deputy Air Commander acknowledged that the pilot of the third sortie was on his first mission. Ibid, para. 111.
36 Ibid., para. 110.
37 Ibid.
38 Ibid., para. 111.
39 Ibid., paras. 111-112.
40 Ibid., para. 112.
41 Ibid., pp. 30-31.
43 EECC Partial Award, op. cit., para. 111.
44 “For Whom the Little Bells Toll”, op. cit. pp. 17-18.
46 “The CB-500 elliptical shaped footprint can cover an area of approximately 50,000km², including a central zone of destruction of some 20,000km², depending on operational parameters such as fuze time setting, release altitude, aircraft speed, and dive angle. The CB-250-K is reported to have about the same destructive footprint, but has a larger range of delivery methods.” “CB-500 & CB-250-K”, Janes Air Launched Weapons, Issue 27, June 1997, p. 1. 50,000m² is equivalent to about the area of nine football or soccer fields.


Ibid, para. 462.

The BLU-97 bomulet also purports to have three “effects”: anti-personnel, anti-vehicle, and incendiary. It is 20cm in diameter. Planning and design began in the mid-70s and production in the mid-80s. CBU-87/B Combined Effects Munitions (CEM) accessed at: www.globalsecurity.org/military/systems/munitions/cbu-87.htm; BLU-97/B Combined Effects Bomb (CEB) accessed at: www.globalsecurity.org/military/systems/munitions/blu-97.htm


Foreseeable Harm, p. 8, op. cit., pp 8, 15.


81 Foreseeable Harm, p. 8, op. cit., pp 8, 15.

82 Foreseeable Harm, p. 8, op. cit., pp 8, 15.


86 Ibid.


89 Ibid., p. 47.


98 “A Barrage of Accusations”, op. cit.


101 Interview with Chris Clarke, MACCSSL, 6 December 2007 (interviewed in Vienna).


110 The complete list of allowable purposes is as follows: "internal security"; "legitimate self-defense"; enabling the recipient to participate in "regional or collective arrangements or measures consistent with the Charter of the United Nations"; enabling the recipient to participate in "collective measures requested by the United Nations for the purposes of maintaining or restoring international peace and security"; and enabling foreign military forces "in less developed countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries". Arms Export Control Act, § 4, summarized in Richard F. Grimmett, Defense Articles and Services Supplied to Foreign Recipients: Restrictions on Their Use, Congressional Research Service Report No. RL30982, pp. 2-3 (14 March 2005), accessed at www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL3098203142005.pdf

111 Ibid.

112 UN Charter, Art. 51.


114 Defense Articles and Services, op. cit., prefatory introduction.

115 Defense Articles and Services, op. cit., p. 5. See also, Kevin Danaher, "Israel's Use of Cluster Bombs in Lebanon", Journal of Palestine Studies, Vol. II, No. 4 (Summer–Autumn, 1982), pp. 48-57.

116 Arms Export Control Act, § 3(c)(1)(A), quoted in Defense Articles and Services, op. cit., p. 2.


119 Ibid.

120 Ibid.

121 Ibid.


123 Foreseeable Harm, op. cit.


129 See ibid, p. 9; also "Panel on Lebanon says UN should ban cluster bombs", Associated Press, 1 December 2006.

130 The "strikes" on the MACC SL maps are where cluster munition delivery mechanisms were found and marked (artillery shells, rocket canisters, air-dropped canisters etc). The "strike" marker indicates where the delivery container fell with the “contamination buffers” drawn in as an estimate based on available data. Interview with Chris Clarke, MACC SL, 6 December 2007.

131 Toby Olditch & Philip Pitchard, "The greater crime: The verdict acquitting us of criminal damage in the B-52 case is fantastic, but Iraqis are still living in a war zone", The Guardian, 23 May 2007, accessed at: http://commentisfree.guardian.co.uk/toby_olditch_and_philip_pitchard/2007/05/on_the_face_of_it.html

132 A similar case in the Republic of Ireland, also involving damage to USAF aircraft, was held earlier in 2006 and resulted in the acquittal of the five accused but the defendants did not specifically use cluster munitions as a defence.


135 “This was not a protest". Trial of B52 disarmers nears its end", Press release, 12 September 2006, accessed at: www.bristol.indymedia.org/newswire.php?story_id=25347

136 “Peace activists offer war crime defence”, op cit.

137 Ibid.

“This was not a protest”, op. cit.

Paul Milling and Margaret Jones: Verdict Expected By Next Wednesday*, Message from Margaret Jones, accessed at: http://groups.yahoo.com/group/bristol-activists/message/3129

“This was not a protest”, op. cit.

Ibid.

“The courts are starting to accept”, op. cit.


“The courts are starting to accept”, op. cit.

Ibid.

This section is based on B52 Two trial report, accessed at: www.b52two.blogspot.com

Report on day three of the trial, B52 Two trial report, accessed at: www.b52two.blogspot.com

Email from Quincy Whitaker, Barrister, 4 April 2007.


Kevin Giles, “Weapons protesters get a break they don’t want”, Minneapolis Star Tribune, 17 January 2006, p. 3B. See also: http://aliantaction.org


Edina, Minn., City Code § 1000.14(A) (Apr. 7, 2005).

“Weapons Protestors”, op. cit.


Martić Initial Indictment, op. cit.

Only four other Rule 61 hearings have been held at the Tribunal. Case Information Sheet, op. cit.

Martić Case Information Sheet, op. cit.


Ibid., pp. 146-47.

The Trial Chamber never found definitively how many rockets fell on Zagreb over the two days. The prosecution alleged at least four each day in its closing brief in 2007. At the Rule 61 hearing in 1996, one expert stated that 12 rockets had been fired on Zagreb over the two days. See Wiebe, op. cit., fn. 150, for a more complete discussion.


Ibid.

Martić, Amended Indictment, op. cit., paras. 49, 51–52, and 54. The names of the killed and wounded civilians are set out in Annex II attached to the indictment.

Martić Amended Indictment, op. cit., para. 55, In 2003, the Prosecution sought and obtained leave from the Trial Chamber to amend the indictment a second time to clarify and correct some matters but not to change any of the counts. The second amended indictment was formally filed on 9 September 2003. Email from Alex Whiting, Senior Prosecuting Trial Attorney, Office of the Prosecutor, ICTY, 11 May 2007.


Ibid.

Martić Initial Indictment, op. cit., para. 7.


Ibid., p. 24.


Testimony of Poje, op. cit., p. 5066.

Ibid., p. 5103.


Prosecutor v. Martić, Case No. IT-95-11-T, Public Redacted Final Trial Brief of Milan Martić, ¶ 158-63 (Jan. 16, 2007) (on file with authors). Nowhere in the Trial Chamber judgment is this argument addressed directly, suggesting the Trial Chamber rejected it sub silentio.

Prosecutor’s Closing Statement, op. cit., p. 11232.

Martić Judgment, op. cit., p. 166 (emphasis added).


Martić Judgment, op. cit., para. 470.

Testimony of Petric, op. cit, pp. 86-87, 92. Mario Petric was the Chief of the Anti-Explosives Department of the Zagreb Police. Ibid., p. 85.

Martić Judgment, op. cit., para. 470.

Testimony of Petric, op. cit, pp. 86-87, 92. Mario Petric was the Chief of the Anti-Explosives Department of the Zagreb Police. Ibid., p. 85.

204 Testimony of Tuksa, op. cit., pp. 66-67. Tuksa first testified that the event occurred on July 27, 1995, then later stated it occurred on July 20. Ibid. The names of the four victims, Alen Kicic, Alen Prokic, Anto Saraf, and Damir Jambresic, do not appear on the lists of victims in the Amended Complaints in the case. For a more detailed discussion of this point, see “For Whom the Little Bell Tolls”, op. cit., pp. 44-47.

205 For more detailed discussion of these lessons, see “For Whom the Little Bell Tolls”, op. cit., pp. 49-54.

206 The case might also be used to support finding liability for longer term effects of unexploded ordnance. For more detailed analysis, see Ibid., pp. 44-47.